75-5706

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. A-182

CHARLES WILLIAM PROFFITT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
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ATTORNEYS FOR PETITIONER

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CHARLES WILLIAM PROFFITT,

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Florida filed on May 28, 1975.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 315 So.2d 461 (Fla. 1975) and is set out in Appendix A hereto, pp. 1a-7a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of Florida was filed on May 28, 1975, and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTION PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Florida violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the statutes of Florida:

Fla. Stat. Ann. §755.082 (1974-1975 supp.)
Penalties for felonies and misdemeanors

"(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole unless the proceedings held to determine sentence according to the procedure set forth in section 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person convicted of a capital felony shall be punished by life imprisonment as provided in subsection (1).

(3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1) . . . ."

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Fla. Stat. Ann. §782.04 (1974-1975 supp.)
Murder

"(1)(a) The unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when

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1/ This section was amended in 1974, and the statutory definition of second degree murder was altered slightly. Florida Laws 1974 c.74-383, §14 (effective July 1, 1975) enacts a new §782.04, which provides:

committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen (years) when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §755.082.

(b) In all cases under this section the procedure set forth in section 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in section 775.084."

1/ Cont'd "782.04 Murder

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person eighteen years or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in chapter 775.

(b) In all cases under this section the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being when perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 755.

(3) When a person is killed in the perpetration of or in the attempt to perpetrate any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb by a person other than the person engaged

Fla. Stat. Ann. §782.07 (1974-1975 supp.)
Manslaughter

"The killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder, according to the provisions of this chapter, shall be deemed manslaughter and shall constitute a felony of the second degree, punishable as provided in §775.082, §755.083, or §775.084."

Fla. Stat. Ann. §784.02 (1974-1975 supp.)
Punishment for assault

"Whoever commits a bare assault is guilty of a misdemeanor and, upon conviction, shall be guilty of a misdemeanor of the second degree, punishable as provided in §755.082 or §755.083."

Fla. Stat. Ann. §784.03 (1974-1975 supp.)
Punishment for assault and battery

"Whoever commits assault and battery is guilty of a misdemeanor and, upon conviction, shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083."

Fla. Stat. Ann. §784.04 (1974-1975 supp.)
Aggravated assault

"Whoever assaults another with a deadly weapon, without intent to kill, shall be guilty of an aggravated assault, and shall be guilty of a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084."

Fla. Stat. Ann. §784.06 (1974-1975 supp.)
Assault with intent to commit felony

"Whoever commits an assault on another, with intent to commit any capital felony or felony of the first degree shall be guilty of a felony of the second degree, punishable as provided in §775.082, §775,083, or §775.084. An assault with intent to commit any other felony constitutes a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084."

1/ Cont'd

in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 775.

(4) The unlawful killing of a human being when perpetrated without any design to effect death, by a person engaged in the perpetration of or in the attempt to perpetrate any felony, other than any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, ... shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in chapter 775."

Fla. Stat. §921.141 (1974-1975) supp.)
Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

"(1) Separate proceedings on issue of penalty. Upon conviction or adjudication of guilt of a defendant of a capital felony the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 755.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practible. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsection (6) and (7), of this section. [2/] Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any heresay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constutution of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury. After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist, and

(c) Based on these considerations, whether the defendant should be sentenced to life. . . .or death.

(3) Findings in support of sentence of death. Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by

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1a/ Subsection (1) of this statute was amended slightly in 1974 by Fla. Laws 1974, c. 74-379 (effective October 1, 1974) to provide that if through "impossibility or inability", the trial jury is unable to reconvene for a hearing or sentencing, a special jury may be summoned.

2/ The subsection setting forth aggravating circumstances and mitigating circumstances in Fla. Stat. Ann. §921.141 (1974-1975 Supp.) however, are numbered respectively, (5) and (6).

specific written findings of fact based upon the circumstances in subsection (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

(4) Review of judgment and sentence. The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.-- Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious or cruel.

(6) Mitigating circumstances.-- Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant, at the time of the crime."

Fla. Stat. Ann. §922.09 (1973) Capital cases

"When a person is sentenced to death, the clerk of the court shall prepare a certified copy of the record to the governor. The sentence shall not be executed until the governor issues a warrant, attaches it to the copy of the record, and transmits it to the warden, directing him to execute the sentence at a time designated in the warrant."

Fla. Stat. Ann. §922.10 (1973) Execution of death sentence

"A death sentence shall be executed by electrocution. The warden of the state prison shall designate the executioner. The warrant authorizing the execution shall be read to the convicted person immediately before execution."

Fla. Stat. Ann. §922.11 (1973) Regulation of execution

"(1) The warden of the state prison or a deputy designated by him shall be present at the execution. The warden shall set the day for the execution within the week designated by the governor in the warrant.

(2) Twelve citizens selected by the warden shall witness the execution. A qualified physician shall be present and announce when death has been inflicted. Counsel for the convicted person and ministers of the gospel requested by the convicted person may be present. Representatives of news media may be present under regulations approved by the head of the department of general services. All other persons except prison officials and guards shall be excluded during the execution.

(3) The body of the executed person shall be prepared for burial and, if requested, delivered at the prison gates to relatives of the deceased. If a coffin has not been provided by relatives, the body shall be delivered in a plain coffin. If the body is not claimed by relatives, it shall be given to physicians who have requested it for dissection or be disposed of in the same manner as are bodies of prisoners dying in the state prison."

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Florida filed on May 28, 1975, affirming petitioner's conviction of first degree murder and sentence of death. Petitioner, Charles William Proffitt, an indigent white male, was sentenced to die by the Circuit Court for Hillsborough County on March 21, 1974, following his conviction of the murder of Joel Medgebow

Dr. Robert Charles Hutchinson was certified as a pathologist, but only after he performed an autopsy on the corpse denicted in the photograph marked State's exhibit number one. (R220-225) Defense counsel's objection to Dr. Hutchinson's expert testimony on the ground that he was unqualified as an expert was overruled. (R225) The doctor gave his opinion that death was caused by acute shock (R229) the result of bleeding (R230) caused by a stab wound seven centimeters deep into the pericardium. (R226-228)

Stephen A. Moore, an identification technician with the Tampa Police Department (R231) went to apartment number 104 at 115 South Lois (R223) on July 10, 1973. (R231) At the apartment, he took twelve photographs (R236) seven of which he identified at trial for the prosecutor. (R232) Mr. Moore also took the photographs identified by Dr.

Hutchinson, which was admitted into evidence without objection. (R232-233) Mr. Moore lifted five fingerprints from a sliding glass door, four "on the inside and one. . .off the door handle on the outside." (R234)

Burt Madix, another identification expert with the Tampa Police (R237) was qualified as an expert as to fingerprint identification, without objection. (R238) On July 17, 1973, he examined the fingerprints taken from the apartment (R239) and determined that one and possibly another were clear enough for comparison purposes. (R240) Neither of the decipherable fingerprints matched the appellant's fingerprints. (R242-243)

Patricia Kay Medgebow, Joel's widow, was at his apartment on 115 South Lois on July 9, 1973, and went to bed about ten o'clock that night. (R248-249) She woke up about quarter of five the next morning at the sound of a moan and saw her husband propped up on one elbow, holding what turned out to be a knife, when suddenly a man jumped up and hit her three times in the face. (R250,251)

Mrs. Medgebow called the police. (R252) Each of the first two people she talked to listened to her story, then switched her to another line. (R261) She pulled Joel to the floor the better to give him artificial respiration and cardiac massage. (R252) Then she went to an apartment across the hall to get a friend. (R252)

She noticed that the sliding glass door was open when she awoke, and believed that it was closed when she went to bed. (R252) Her assailant was a white male with light brown heir wearing a white pin-striped shirt with long sleeves rolled up and the tail out over a pair of grey or khaki trousers. (R255) The prosecutor asked Mrs. Medgebow to "look around the courtroom and see if you can recognize the person that struck you" and she replied "No, I don't see anyone." (R254)

On cross-examination, Mrs. Medgebow testified that she had been separated from her husband for two month and had visited in apartment 104 on about five occasions after the separation. (R258) On account of artificial lights in the parking lot and on the wall of the apartment building, "It was quite a bit of light in there." (R260) Her assailant's shirt did not have a Maas Brothers' emblem. (R262) Defense counsel brought out discrepancies between Mrs. Medgebow's trial testimony and testimony she had given on deposition as to the intruder's physical characteristics. (R263-266)

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Mrs. Medgebow testified that she had smoked a joint of marijuana earlier the evening of July 9, 1973, but had shared the "joint between five people." (R268) Defense counsel sought to inquire as to any connection between the decedent's use of drugs and his death, but the prosecutor's objection was sustained and the trial judge instructed the jury to disregard the question. (R268-269)

Ben Stinson, who lived in apartment 102 across from Joel Medgebow (R272) was awakened by Mrs. Medgebow on the morning of July 10, 1973. (R273) He went through the opening left by the sliding glass door in search of the malefactor but found nobody. (R 274) The apartment had not been ransacked. (R276)

Johnny E. Perkins, a Tampa police corporal, (R278) arrived at the Medgebow apartment the morning of July 10, 1973, in response to a call. (R279) Officer Bushnell was with him. Id. The sliding glass door was bent slightly and scratched. (R284,285) Mr. Perkins identified the knife marked State's exhibit number nine as the one he had taken from the apartment to the property room of the Tampa Police Department. (R287) State's exhibits two through eight came into evidence without objection. (R282-284)

During cross-examination, defense counsel asked whether Mr. Perkins had found "any contraband in the apartment." (R296) Prosecution objection to this question was sustained. (R298)

Larry Roy Gedesse, a co-worker with appellant at Maas Brothers (R302) left work about seven or seven thirty o'clock the evening of July 9, 1973, at the same time as the appellant. (R303) The appellant was driving a white Dodge or Plymouth and met Mr. Gedesse at Caesar's Palace, a bar on Dale Mabry. (R304) When Mr. Gedesse left the bar at ten thirty or eleven, the appellant was still there with Michael Seary. (R305)

Michael Charles Seary, also a fellow employee at Maas Brothers (R307), arrived at the bar after work and stayed until about three in the morning of July 10, 1973. (R304) The appellant drove Mr. Seary to his Montgomery Avenue home in a white Dodge. (R310) The appellant who had been drinking, left the Seary home at half past three or quarter till four. (R311)

After cross-examination of Seary, there was a short recess. (R314) The State then recalled Mr. Seary, over defense objection. (R315-317) Mr. Seary testified that the rendezvous at Caesar's Palace on July 9, 1973, had not been discussed earlier in the day of July 9, 1973. (R320)

Patricia Ann Proffitt, the appellant's wife, (R321) was living at the DeSoto Trailer Park with her husband, Mary Bassett and Mary Bassett's daughter on July 9, 1973. (R322) The appellant went to work that day in a white Dodge, 1964 model, wearing a white shirt and grey pants. (R323) The appellant returned to the trailer about quarter past five on July 10, 1973. (R325) He had on the same clothes as when he left except that he was barefoot. (R326)

The trailer has a living room, a bathroom, a kitchen, two bedrooms, and a hallway. (R325) The appellant went into a bedroom, packed and left. (R326) Mrs. Rroffitt then went to a telephone and called the police. (R328) She next saw the car in which her husband left the trailer at a place of business in Brooksville. Id.

On cross-examination, Mrs. Proffitt testified that the white shirt worn by appellant when he left for work and which he still wore on his return had a blue oval emblem on it. (R331) Mrs. Bassett contributed one hundred dollars monthly to rent totaling two hundred dollars including utilities. (R330) The appellant made ninety to a hundred dollars weekly. Id.

Vance Catlin, a Tampa policeman, went to the Proffitt trailer at 5:45 A.M. on July 10, 1973, and took photographs which came into evidence, without objection, as State's exhibits numbers twelve, thirteen and fourteen. (R335) He also seized a shirt and a pair of pants, which were marked at State's exhibits numbers ten and eleven, respectively. (R334)

M.O. Stamatakis, another Tampa policeman, spoke to Mesdames Bassett and Proffitt at the police station on July 10, 1973, and then went with them to the State Attorney's Office. (R340) Mr. Stamatakis sent the knife and shirt to Washington and put them back in the property room when they were returned by mail. (R342,343) State's exhibits nine, ten and eleven came into evidence without objection. (R346) A week before the trial, Mr. Stamatakis measured the distance between 115 South Lois and the DeSoto Trailer Park as 6.6 miles. Id. Over objection, he testified it had taken eleven minutes to make the drive.

Mr. R. J. Peters, a Florida Highway Patrolman, (R353) found a 1964 Dodge automobile abandoned on State Road 50 about 6:35 A.M. on July 10, 1973. (R353-355)

Paul Rene Bidez, an FBI serologist (R357), testified that the blood on the knife was human blood, type A, the same type the decedent had. (R359-360) Droplets of blood on the shirt were human blood of an indeterminate type. (R361) Mr. Bidez testified that a stain had a crescent shape "as though something bloody had been wiped." (R361) Defense counsel's objection to this remark was sustained, but the prosecutor reiterated the testimony in the presence of the jury while arguing after the court had ruled. (R362)

On cross-examination, Mr. Bidez testified he was unable to determine how long the stains had been on the shirt. (R363) An examination of the knife for fingerprints yielded none. (R364)

Mary Helen Bassett and her daughter shared a trailer with the Proffitts. (R367) Over objection, Mrs. Bassett testified she awoke about half past five on July 10, 1973, and overheard a conversation between the appellant and his wife. (R375) The appellant told his wife he had stabbed a man. (R376-377) Defense objection on hearsay grounds was denied and Mrs. Bassett testified to questions Mrs. Proffitt asked the appellant. (R377) The appellant also said he struck a woman. (R379) Although Mrs. Bassett never saw the appellant, she was sure his was the voice she heard. (R388)

At the close of the evidence, the trial court instructed the jury that it could return verdicts of guilty of first degree murder, guilty of second degree murder, guilty of third degree murder, guilty of manslaughter, or not guilty. (R488-490) The jury found petitioner guilty of first degree murder. (R491) A sentencing hearing was held following the verdict. The State offered into evidence a certified copy of a document from the State of Connecticut showing that petitioner had been convicted, on July 11, 1967, of breaking and entering without permission. Over objection, the document was admitted. (R495)

The State called James Crumbley, M.D. The doctor testified that he had interviewed petitioner in the Hillsborough County Jail on two occasions. Both interviews were at petitioner's request and both dealt with the charges then pending against him. On both occasions petitioner admitted that he had killed a man as a result of an "uncontrollable desire". He explained that he had "[r]ode around and found a place where a patio door was open and he went in and killed a man, that he stabbed him and that he was now facing trial". (R498) According to Dr. Crumbly, petitioner felt that same "uncontrollable desire" building up again and was concerned that he would kill another person unless he received some treatment for his emotional condition. When asked if he considered petitioner a danger to society, Dr. Crumbley answered "Absolutely". (R500)

The State offered no further evidence in aggravation and petitioner offered no evidence in mitigation. (R505) The court then instructed the jury that:

> ". . . the final decision as to what punishment should be imposed or shall be imposed, is the responsibility of the Judge. However, it is your duty to follow the law which will now be given you by the Court and render to the Court an advisory sentence, based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> . . . .
>
> If you do not find that there existed any of the aggravating circumstances which have been described to you, it would be your duty to recommend a sentence to life imprisonment. If you should find one or more of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.
>
> . . . .
>
> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed."
>
> (R452,454,456)

The jury's sentencing verdict stated "[t]he majority of the jury advise and recommend to the court that it impose the death penalty upon the defendant, Charles William Proffitt. (R535)

The court ordered that petitioner be examined by psychiatrists before sentencing. (R537) The report of both doctors said, in essence, that petitioner was competent at the time of the offense and at the trial. He also understood the consequences of the trial and the possible sentence which could be imposed. (R544)

Sentencing was held on March 21, 1974. The court concurred with the jury's finding that "the aggravating circumstances of this case far outweigh any mitigating circumstances shown to exist". (R556) Petitioner was sentenced to death. (R557)

The material portions of the court's written "Findings of Fact in Support of the Death Penalty" reads:

AS TO AGGRAVATING CIRCUMSTANCES:

(A) That the Defendant, CHARLES WILLIAM PROFFITT, murdered JOEL RONNIE MEDGEBOW from a premeditated design and while the Defendant, CHARLES WILLIAM PROFFITT, was engaged in the commission of a felony, to-wit: burglary.

(B) That the Defendant, CHARLES WILLIAM PROFFITT, has the propensity to commit the crime for which he was convicted, to-wit: Murder in the First Degree and is a danger and a menace to society.

(C) That the murder of JOEL RONNIE MEDGEBOW by the Defendant, CHARLES WILLIAM PROFFITT, was especially heinous, atrocious and cruel.

(D) That the Defendant knowingly through his voluntary and intentional acts leading up to and during the course of the commission of the offense for which he was convicted created a great risk of serious bodily harm and death to many persons.

AS TO MITIGATING CIRCUMSTANCES:

The Court finds that the enumerated mitigating circumstances set forth in F. S. 921.141(7) are primarily negated, in that,

(A) The Defendant, CHARLES WILLIAM PROFFITT, was convicted in 1967 of Breaking and Entering without permission.

(B) That the capital felony for which the Defendant, CHARLES WILLIAM PROFFITT, was convicted was not committed while the Defendant, CHARLES WILLIAM PROFFITT, was under the influence of extreme mental or emotional disturbance.

(C) That the victim, JOEL RONNIE MEDGEBOW, was not a participant in the Defendant's conduct nor did the victim, JOEL RONNIE MEDGEBOW, consent to the act.

(D) That the Defendant, CHARLES WILLIAM PROFFITT, was the only participant in the capital felony for which he has been convicted.

(E) That the Defendant, CHARLES WILLIAM PROFFITT, did not act under extreme duress during the commission of the offense nor was he, during that period of time under the substantial domination of another person.

(F) That at the time of the commission of the offense the Defendant's capacity to appreciate the criminality of his conduct or to conform this conduct to the requirements of law was not substantially impaired.

(G) The age of the Defendant, CHARLES WILLIAM PROFFITT, to-wit: age 28 years, has no particular significance and therefore is not a mitigating circumstance.

The Supreme Court of Florida affirmed petitioner's conviction and sentence. Proffitt v. State, 315 So.2d 461 (Fla. 1975). On August 29, 1975, Mr. Justice Powell granted petitioner a stay of execution "pending the timely filing and disposition by this Court of a petition for a writ of certiorari".

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner moved in this trial court to dismiss the Indictment charging him with first degree murder on the grounds that the statutes under which the indictment was presented are unconstitutional. Among the reasons cited are, first, that the statutes provide for "cruel and/or unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution". (R22) Second, "that the use of the death penalty pursuant to Florida Statute 921.141 by the State of Florida, contravenes the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972)". (R23) The motion was denied. (R25)

On appeal, petitioner assigned as error the following:

The trial court's imposition of the death penalty constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments to the United States Constitution.

The trial court's imposition of the death penalty constituted the arbitrary infliction of punishment so as to deprive the defendant of life without due process of law, in contravention of the fourteenth amendment to the United States Constitution.

The trial court erred in imposing death sentence in that the intentional extinguishing of life does not comport with human dignity.

The trial court erred in imposing death sentence in that execution is a wantonly freakish, arbitrary and capricious punishment, by its nature irrevocable.

The trial court's imposition of the death penalty pursuant to FLA. STAT. §921.141 (1972) constituted cruel and unusual punishment and a denial of due process of law in contravention of the eighth and fourteenth amendments to the United States Constitution in that the trial judge had untrammeled discretion to impose life sentence which could not be reviewed, but instead imposed sentence of death.

Only after the trial judge decided to impose sentence of death, in the exercise of his unfettered discretion, did he justify the sentence in writing; and this procedure denied defendant due process of law in contravention of the eighth and fourteenth amendments to the United States Constitution.

Supplemental Assignments of Error Nos. 2, 3, 4, 5, 7, 8. (R614,615)

This issue was briefed, Proffitt v. State, Fla. Sup. Ct. No. 45,541, Appellant's Brief at 46-48, and the Florida Supreme Court rejected this claim:

> Finally, as to Appellant's eleventh point, whether the death penalty is cruel and unusual punishment, we note that this argument is meant to preserve the point for appeal, however, we are bound by our earlier pronouncement in State v. Dixon, 283 So.2d 1 (Fla. 1973).
> Proffitt v. State, 315 So.2d at 467 (1975).

REASONS FOR GRANTING THE WRIT

1. THE COURT SHOULD GRANT CERTIORARY TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF FLORIDA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. The Perpetuation of Arbitrary Selectivity Under the New Florida Capital Punishment Statute

On June 29, 1972, this Court held that the death penalty could no longer be imposed under statutory schemes which permitted its arbitrary, rare, and irregular infliction. Furman v. Georgia, 408 U.S. 238 (1972). Shortly after Furman, the Florida legislature modified its death penalty statutes by enacting Florida Laws 1972, c. 72-724 (Special Session). The question presented here is whether the modifications wrought by the Florida legislature are substantial enough to meed the minimum requirements of Furman: that the most extreme penalty known to contemporary man be not exacted arbitrarily.

The new Florida law provides a bifurcated trial procedure for the administration of the death penalty. 9/ See generally State v. Dixon, 238 So.2d 1 (1973), attached as Appendix B, pp. 1b-27b, infra. After a verdict, finding, or plea of guilty to a "capital felony," a sentencing hearing is conducted before a judge and jury wherein.

> "[e]vidence may be presented as to any matter that the court deems relevant to sentencing, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) [(5) ?] and (7) [(6) ?] of this section.
>
> Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." 11/

9/ Florida Statutes Annotated §775.082 (1974-1975 supp.) provides a possible death penalty for a "capital felony," to be administered pursuant to the sentencing procedure established by Fl Stat. Ann. §921.141 (1974-1975 supp.). Florida law defines two "capital felonies": first degree murder, Fla. Stat. Ann. &782.04(1) (1974 1975 supp.), and rape committed by a defendant seventeen years of age or older upon a child under the age of eleven, Fla. Stat. Ann. §794 01 (1) (1974-1975 supp.).

11/ This subsection prohibits, however, "the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Florida."

Fla. Stat. Ann. §921.141 (1) (1974-1975 supp.).

After hearing the sentencing evidence, the jury is to "render an advisory sentence to the court, based upon the following matters:

> (a) Whether sufficient aggravating circumstances exist as enumerated . . . [in §921.141(5)];
>
> (b) Whether sufficient mitigating circumstances exist as enumerated in . . . [921.141 (6)], which outweigh the aggravating circumstances found to exist, and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life or death."

Fla. Stat. Ann. §921.141(2) (1974-1975 supp.). This sentencing recommendation is not required to be in writing, to reflect specific considerations of the statutory circumstances, to reveal the proportion of the jurors in favor of life or death, or to describe in any way the process whereby the jury arrived at its result. 12/ The "advisory sentence" does not bind the trial court for "[n]otwithstanding the recommendations of the majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death," Fla. Stat. Ann. §921.141 (3) (1974-1975 supp.). When the court imposes sentence, it must make a "specific written findings of fact" in support of the sentence "based upon the circumstances in [Fla. Stat. Ann. §921.141 (5), (6) (1974-1975 supp.)] . . . and upon the records of the trial and the sentencing proceedings." Fla. Stat. Ann. §921.141 (3) (b) (1974-1975 supp.); see State v. Dixon, supra, 283 So.2d at 8.

Each "judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida." Fla. Stat. Ann. §921.141 (4) (1974-1975 supp.). The statute provides no guidelines for this appellate scrutiny, and the scope of review is not clear. Executive discretion to grant or deny clemency in cases where a death sentence has been imposed remains unregulated by law.

12/ Petitioner's jury returned a verdict which stated: "[a] majority of the jury advise the recommend to the Court that it impose the death penalty upon the defendant, CHARLES WILLIAM PROFFITT." R.535.

The discrepancy between the regularity and even-handedness constitutionally requred in capital sentencing and the unpredictable arbitrariness which results from the modified Florida procedures can only be appreciated after analysis of the various selective machanisms which operate before, during, and after sentencing of defendants charged with crimes potentially punishable by death. And despite the mandate of Furman, the present Florida capital punishment statute provides "no meaningful basis for distinguishing the few cases in which . . . [the death penalty] is imposed from the many cases in which it is not." Furman v. Georgia, supra, 408 U.S. at 313 (concurring opinion of Mr. Justice White).

1. Pre-Sentence Selective Mechanisms

Arbitrary selection begins well before sentencing to spare a substantial portion of Florida capital defendants, although others similarly situated are ultimately sentenced to death. Several pre-sentence selective mechanisms combine to avert the death penalty from numerous capitally chargeable defendants, operating in a fashion that fails to assure the slightest semblance of regularity in the choice of those who will eventually suffer the extreme penalty.

i. Prosecutorial Discretion

In Florida, each state attorney must "appear in the circuit court within his judicial circuit, and prosecute or defend on behalf of the state all suits, applications, or motions, civil or criminal, in which the state is a party." Fla. Stat. Ann. §27.02. 16/ He consequently has broad and unreliable authority to make charging decisions and to initate and terminate prosecutions. 17/ The State Attorney:

> "[T]he constitution and statutes impose a duty upon the state attorney to prosecute in the circuit court any and all violations of the criminal laws of which that court has jurisdiction either upon his own information or upon indictment by the grand jury. If any indictment has not been found or any information filed for such an offense, then all indictable offenses triable within the county should be presented to the grand jury by the state attorney."

16/ Cf. Fla. R. Crim.P. 3.115: "The state attorney shall provide the personnel or procedure for criminal intake in the judicial system." No further guidelines are established.

17/ The statutes defining the powers of the State's Attorney are to be "liberally construed." Barnes v. State, 58 So.2d 157, 159 (Fla. 1952).

> "[h]as been loosely referred to many times as a 'one-man grand jury'. And he is truly that. He is the investigatory and accusatory arm of our judicial system of government, subject only to the limitations imposed by the Constitution, the common law, and the statutes, for the protection of individual rights and to safeguard against the possible abuses of the far-reaching powers so confided."

Imperato v. Spicola, 238 So2d 503, 506 (Fla. App. 1970).

> "[W]ithin the limits of the constitution and applicable statutes all steps in the prosecution of persons suspected of crime are under . . . [the state attorney's] supervision and control."

Collier v. Baker, 155 Fla. 425, 20 So.2d 652, 653 (1945). 18/

Although the Florida legislature could, pursuant to its authority to prescribe the "powers and duties" of the state attorney, Owens v. State, 61 So.2d 412, 414 (Fla. 1952); see also Johns v. State, 144 Fla. 256, 197 So. 791, 796 (1940), enact guidelines to specify when a capital indictment should be sought, it has not done so, and the prosecutor's power to seek or to forego capital indictments remains broadly discretionary:

> "[w]here . . . [a state attorney's duty and authority require the examination of evidence in the determination of law and the fact before taking action thereon, his duty and authority is ordinarily not strictly ministerial, but may even be quasi-judicial or discretionary in its character." 19/

Hall v. State, 136 Fla. 644, 187 So. 392, 398 (1939).

The state attorney can terminate a criminal action whenever he determines "that the prosecution is not justified." Barnes v. State, 58 So.2d 157, 159 (Fla. 1952). See generally Wilson v. Renfree, 91 So.2d 857, 859-860 (Fla. 1956). "[T]he State has a right to take a nolle prosequi at any time prior to the jury being sworn." State v. Sokol,

17/ (cont'd) State v. Mitchell, 188 So.2d 684, 687, (Fla. App.), cert. discharged, 192 So.2d 281 (Fla. 1966). See also Smith v. State, 95 So.2d 525, 527 (Fla. 1957). Cf. Newton v. State, 178 So.2d 341,344 (Fla. 1965)

18/ All capital prosecutions in Florida must be initiated by indictment. Fla. Const. art. I, §15; Fla. R. Crim. P. 3.140 (a) (1) (1974-1975 supp.). Any grand jury, of course, has absolute discretion to indict or to refuse to indict regardless of the evidence presented to it.

19/ Cf. Carlile v. State, 129 Fla. 860, 176 So. 862, 863 (1937): "The state attorney has a very broad discretion in examining witnesses. . . . prior to indictment."

208 So.2d 156 (Fla. App. 1968), without consent of the trial court. 20/ When a state attorney retracts an indictment or information without the formal entry of a nolle prosequi, the charge may be refiled without securing judicial approval. 21/ State v. Wells, 277 So.2d 543, 654 (Fla. App. 1973); State v. Fattorusso, 228 So.2d 630, 632 (Fla. App. 1969); Wilk v. State, 217 So.2d 610, 612 (Fla. App. 1969). Under the state attorney's authority to "contract with a criminal for his exemption from prosecution," Ingram v. Prescott, 111 Fla. 320, 149 So. 369 (1933), he may file capital charges against one co-defendant but not against another equally culpable co-defendant. And the state attorney can seek a conviction for any lesser degree of a capital offense, Fla. R. Crim. P. 3.140(k)(6), or for "any lesser offense, which, although not an essential ingredient of the major crome, is spelled out in the accusatory pleading in that it alleges all of the elements of the lesser offense." State v. Anderson, 270 So.2d 353, 356 (Fla. 1972)

Furthermore, the state attorney's discretion to plea bargain -- a process by which an estimated ninety per cent of all criminal cases are resolved 22/ -- is utterly unfettered by the post-Furman capital punishment statute or by any other significant restrictions. Florida Rule of Criminal Procedure 3170(g) (1974-1975 supp.) explicitly authorizes plea bargaining:

> "[t]he defendant, with the consent of the court and of the prosecuting attorney, may plead guilty to any lesser offense than that charged which is included in the offense charged in the indictment or information, or to any lesser degree of the offense charged."

20/ If such consent is not obtained and if the nolle prosequi is not made part of a formal judgement, the state attorney is not prevented from prosecuting a party in violation of the nolle prosequi agreement, however. Ingram v. Prescott, 111 Fla. 320, 149 So. 369, 370 (1933) (dictim).

21/ Fla. R. Crim. P. 3.191 (1974-1975 supp.), setting forth certain provisions to assure criminal defendants a speedy trial, may limit the period in which an action can be refiled by the state attorney.

22/ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967)

Rule 3.171 (1974-1975 supp.) provides that "[t]he Prosecuting Attorney is encouraged to discuss and agree on pleas which may be entered by the defendant." Where plea bargaining precedes the filing of the charging paper, even the discretionary power of the trial court to supervise negotiated dispositions can be avoided. For in Florida, defendants have a legal right to plead guilty to a criminal charge, Canada v. State, 144 Fla. 633, 198 So. 220, 223 (1940); Eckles v. State, 132 Fla. 526, 180 So. 764, 766 (1938); and a trial court's power to reject a guilty plea is limited to those cases where the plea is "not 'entirely voluntary by one competent to know the consequence,' or is 'induced by fear, misapprehension, persuasion, promises, inadvertence, or ignorance.'" Reyes v. Kelly, 224 So.2d 303, 305 Fla. 1969).

> "A trial court is not authorized to arbitrarily refuse to accept an unqualified plea of guilty made by a defendant in a non-capital case for any other reason.
>
> There is no more reason to allow such action by a trial judge than there is to allow a defendant to withdraw such a plea at his pleasure. If a trial judge has the discretion to refuse only for cause permission to withdraw a plea of guilty, he should not be allowed, without cause, to reject such a plea. The right to enter such a guilty plea should be no less sacred than the right to enter a plea of not guilty."

224 So.2d at 306. See Fla. R. Crim. P. 3.160(c) (1974-1975 supp.).

Plea bargaining is frequent in capital cases, and the Florida Supreme Court has stated that when a defendant "plead[s] guilty in order to escape the electric chair," he gets "what he bargained for -- a life sentence and . . . no right to complain." Lewis v. State, 98 So.2d 46, 47 (Fla. 1956). One observer has concluded that the prosecutor's decision whether to plea bargain in the case of a capitally charged defendant is "probably the most widely significant choice separating the doomed from those who . . . go to prison." 23/ But there exists no procedures to control the employment of differing standards for the acceptance of less-than-capital guilty pleas by different state attorneys or to monitor or correct the inconsistent or capriciously applied policy of an individual state attorney.

23/ BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 43 (1974).

Without any guidance whatsoever, [24/] then, a state attorney is free to make the decision whether a capital charge will be sought and prosecuted. He may "without violating [his] trust or any statutory policy . . . refuse to [seek] the death penalty no matter what the circumstances of the crime." Furman v. Georgia, supra, 408 U.S. at 314 (concurring opinion of Mr. Justice White).

ii. Jury Discretion

Although express sentencing discretion is conferred upon the trial judge by Fla. Stat. Ann. §921.141 (1974-1975 supp.), see pp. 43-53 infra, the jury also has complete discretion to spare a capital defendant's life by convicting him of a lesser offense. Petitioner's jury, for example, was charged that it might convict him of first degree murder, second degree murder, third degree murder, manslaughter, assault with intent to commit felony, aggravated assault, assault and battery, or simple assault. These crimes range from a capital felony (first degree murder) to a second degree misdemeanor punishable by no more than sixty days imprisonment (simple assault).

Although the respective crimes are defined in terms of elements that are theoretically distinct and mutually exclusive, the imprecision of the definitions allow a jury wide latitude to shape its guilt verdict so as to avoid or permit the imposition of a death penalty at the sentencing stage. (Such action is made more likely when, as here, the jurors are informed on voir dire that a death penalty may be the result of a verdict of guilty of first degree murder.) For example, "premeditation" is an element of

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24/ Discretionary prosecution in Florida is even greater in cases involving juveniles (persons under age eighteen, Fla. Stat. Ann. §39.01 (1974-1975 supp.)). A "child of any age" charged with a crime punishable by death or by life imprisonment is subject to juvenile jurisdiction "unless and until an indictment on such charge is returned by the grand jury." Fla. Stat. Ann. §39.02(5)(c) (1974-1975 supp.). The juvenile court may also waive jurisdiction when there is probable cause to believe that a child fourteen years old or older has committed a felony. Fla. Stat. Ann. §39.09(2)(a) (1974-1975 supp.); Fla. R. Juv. P. [Temp.] 8.110(b)(5). Thus, three seventeen year old children accused of first degree murder (Fla. Stat. Ann. 782.04(1) (1974-1975 supp.)) or the rape of a child under eleven (Fla. Stat. Ann. §794.01(1) (1974-1975 supp.) might be prosecuted in three totally different ways: the first child could be indicted and tried on a capital charge; the second child could be "waived" to adult court and tried there for non-capital rape or a non-capital degree of homicide; the third child could be tried in a delinquency proceedings in juvenile

first degree (but not of second degree) murder:

> "[a] premeditated design to effect the death of a human being is a fully formulated and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time which must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a few moments and yet be premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit of some reflection and deliberation on the part of the party entertaining it, and the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequences of carrying such a purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formulation of the intent."

McCutchen v. State, 96 So.2d 152, 153 (Fla. 1957). See also Purkhiser v. State, 210 So2d 448, 449 Fla. 1968); Mackiewicz v. State, 114 So.2d 684, 691 (Fla. 1959); Polk v. State, 179 So2d 236, 237 (Fla. App. 1965).

> "Premeditation may be inferred from evidence as to the nature of the weapon used, the manner in which the murder was committed and the nature and manner of the wounds inflicted."

Hernandez v. State, 273 So.2d 130, 133 Fla. App. 1973). See also Larry v. State, 104 Fla. 520, 140 So. 309, 310 (1932). Or it may not be so inferred.

For second degree murder (but not for manslaughter), [26/] the State must establish that a defendant acted with a "depraved mind regardless of human life":

> "[d]epravity of mind is an inherent deficiency of moral sense and rectitude . . . It is the equivalent of the statutory phrase 'depravity of heart' which has been defined to be the highest grade of malice. . .

24/ (cont'd) court. As in adult cases, the prosecutor has unfettered discretion to press, or to decline to press, for an indictment or waiver. See Johnson v. State, 314 So.2d 573 (Fla. 1975).

26/ The crime of third degree murder in Florida is not, in terms of its elements, an intermediate offense between manslaughter and second degree murder. Third degree murder is instead a felony murder committed "without any design to effect death" in which the predicate felony is not arson, rape, robbery, burglary, kidnapping, aircraft piracy, or "the unlawful throwing, placing, or discharging of a destructive device or bomb." Fla. Stat. Ann. §782.04(3) (1974-1975 supp.) See Johnson v. State, 91 So2d 185, 187 (Fla. 1956); Grimes v. State, 64 So.2d 920, 921 (Fla. 1953); Tilman v. State, 81 Fla. 558, 88 So 377, 378, (1921).

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> It is obvious . . . that the phrase "evincing a depraved mind regardless of human life", as uded in the statute . . . denouncing murder in the second degree, was not used in the legal or technical sense of the word 'malice' in the popular or commonly understood sense of ill will, hatred, spite, an evil intent. It is the malice of the evil motive which the statute makes an ingredient of the crime of murder in the second degree."

Ramsey v. State, 114 Fla. 776, 154 So. 855, 856 (1934).[27] See also Huntley v. State, 66 So.2d 504, 507 Fla. 1953); Luke v. State, 204 So.2d 359, 362 (Fla. App. 1967); Darty v. State, 161 So.2d 864, 873 (Fla. App. 1964); Smith v. State, 282 So.2d 179, 180 (Fla. App. 1973);[28] Bega v. State, 100 So.2d 455, 457 (Fla. App. 1958).

27/ Ramsey v. State, supra, ibid.:

> "[h]owever, severe the criticism may be of the conduct of the accused in killing young Ellis, it cannot be justly said that it proceeded from an evil motive, from ill will, hatred or spite. It may have sprung from a flame of hottest indignation, outraged decency, humiliating insult, produced by a drunken vulgarian's obscene conduct toward the daughter of his host, but emotions of that kind cannot properly be said to be the product of an evil mind, a vicious corrupt, base perverse, malicious motive which may be said to characterize a 'depraved mind regardless of human life.'"

28/ In this case, the Court of Appeals approved the following jury instruction:

> "[a]n act is one imminently dangerous to another and evincing a depraved mind regardless of human life if it is an act which
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> 1. a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another
>
> 2. is done from ill-will, hatred, spite or evil intent, and
>
> 3. is of such a nature that the act itself indicates an indifference to human life."

282 So.2d at 180.

The line separating first degree felony-murder and second degree felony-murder is also extremely unclear. The statute provides that first-degree murder is a murder "committed by a person engaged in the perpetration of, or in the attempt to perpetrate" any of eight designated felonies. Fla. Stat. Ann. §782.04(1)(a) (1974-1975 supp.) The same statute provides, however, that second degree murder is a murder "committed in the perpetration of, or in the attempt to perpetrate" seven of the eight felonies designated in §782.04(1)(a). Fla. Stat. Ann.782.04(2) (1974-1975 supp.). By not distinguishing between the two degrees of felony-murder, the statute fails to guide the jury in determining whether a felony murder should be characterized as capital. The statute thus "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. Rockford, 408 U.S. 104, 108-109 (1972). See also Smith v. Goguen, 415 U.S. 566, (1974); Connally v. General Construction Company, 269 U.S. 385, 391 (1926); and cases cited in Grayned v. Rockford, supra, 408 U.S. at 108 n.4.

> "[T]he statute is inherently defective in that the distinctions between first and second degree murder are so ambiguous as to make it impossible for grand juries, petit juries and judges to distinguish the difference. As written, the effect of these statutory provisions is that one who illegally causes the death of another while committing certain other felonies may be guilty of first degree murder, while, in another trial, one who causes death to another under exactly the same circumstances may be guilty of second degree murder."

State v. Dixon, supra, 283 So.2d at 26-27 (dissenting opinion of Mr. Justice Boyd) (footnote omitted).

The majority of the Florida court rejected this vagueness claim and purported to restrict the legal meaning of the statutory language. The court reasoned:

> "[t]he trial judge in State v. Dixon held that the distinction between the two sections of the murder statute was illusory, and that one charged with one of the crimes could interchangeably be charged with the other at the whim of the grand jury. We disagree, and hold that the statute does establish two separate and easily distinguishable degrees of crime, depending upon the presence of the defendant as a principal in the first or second degree.

> Under the prior Fla. Stat. §782.04, F.S.A. (amended effective December 8, 1972), the distinction was not present, and Fla. Stat. §776.011, F.S.A., provides,
>
> 'Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, is a principal in the first degree and may be charged, convicted and punished as such, whether he is or is not actually or constructively present at the commission of such offense.'
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> The effect of this law was that the traditional definitions of principal in the first degree, principal in the second degree, and accessory before the fact were all combined within the statutory definition of principal in the first degree in Fla. Stat. §776.011, F.S.A., and in the repealed Fla. Stat. §782.04, F.S.A.
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> The obvious intention of the Legislature in making this change is to resurrect the distinction between principals in the first or second degree on the one hand and accessories before the fact on the other, in determining whether a party to a violent felony resulting in murder is chargeable with murder in the first degree or murder in the second degree. As to the distinction in any particular case, we need but refer to the rich heritage of case law on the distinction between principals in the first or second degree and accessories before the fact.

State v. Dixon, supra, 293 So.2d at 11. See also Alford v. State, No. 44,647 (Jan. 29, 1975) (slip op. at 4) (App. D, infra, at 4d).[29]

The Florida Supreme Court's effort to rationalize Florida's felony murder provision is wholly unsuccessful,[30] since the distinction between principals in the first or second degree and accessories before the fact provides no meaningful restriction of the jury's discretion to convict for either first or second degree murder in any particular case.

29/ The Dixon court surmised that the "obvious intention" of the Florida legislature in enacting the present murder statute was to "resurrect the distinction between principals in the first or second degree on the one hand and accessories before the fact on the other" (State v. Dixon, supra, 283 So.2d at 11) which the legislature had abolished in 1957. See Fla. Stat. Ann §776.011 (1973). However, the Florida legislature subsequently amended the elements of second degree felony-murder so that the crime occurs when a person is killed in the perpetration of the enumerated felonies "by a person other than the person engaged in the perpetration of or in the attempt to perpetrate" the felonies. Florida Laws 1974, c. 74-383, §14. See note 1 supra. The legislature thereby rejected the Florida Supreme Court's theory of principals and addressed itself to felony-murder situations involving death caused by a police officer, victim, or bystander reacting to the underlying felony.

30/ A state court's construction of a statute can restrict its facial vagueness sufficiently to pass constitutional muster. See, e.g. Wainwright v. Stone, 414 U.S. 21 (1973). Nonetheless, a state court's

Every defendant charged with first degree murder may request that his jury be instructed of its power to convict him alternatively of second degree or third degree murder:

> "[i]f the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense.."

Fla. R. Crim. P. 3.490 (1974-1975 supp.).[32] A trial court's refusal to grant a lesser-degree instruction is reversible error. Little v. State, 206 So.2d 9, 10 (Fla. 1968); Bailey v. State, 224 So.2d 296, 299 (Fla. 1969).

Moreover, a defendant charged with first degree murder may, as in this case, have his jury instructed on other non-capital offenses which are not lesser degrees of homicide but which are "necessarily included" in charges of first degree murder:

> "[u]pon an indictment or information upon which the defendant is to be tried for any offense the jurors may convict the defendant . . . of any offense which is necessarily included in the offense charged. The court shall charge the jury in this regard."

Fla. R. Crim. P. 3.510 (1974-1975 supp.).[34]

30/ (cont'd) effort to save a facially vague statute is reviewable, and if its construction fails to refine or narrow ambiguous language, the construction is inadequate. See Lewis v. New Orleans, 415 U.S. 130 (1974); Winters v. New York, 333 U.S. 507 (1948).

32/ This rule became effective on February 1, 1973; its predecessor was the identically worded Fla. Stat. Ann. §919.14 (1969).

34/ This rule became effective on February 1, 1973; its predecessor was the almost identically worded Fla. Stat. Ann. §919.16 (1969). A trial judge has some discretion to deny a "necessarily included" instruction:

> "[t]his . . . category comprehends those offenses which may or may not be included in the offense charged, depending upon, (a) the accusatory pleading, and (b) the evidence at the trial. In this category, the trial judge must examine the information to determine whether it alleges all of the elements of a lesser offense, albeit such lesser offense is not an essential ingredient of the major offense alleged. If the accusation is present, then the judge must determine from the evidence whether it supports the allegation of the lesser included offense. If the allegata and probata are present then there should be a charge on the lesser offense."

Brown v. State, 206 So.2d 377, 383 (Fla. 1968) (emphasis in original).

This, then, is the first -- but not the last -- trial process operating under Florida law to spare the lives of some capital defendants while consigning an arbitrarily selected group of other capital defendants to death. 35/

2. Sentencing Discretion

The post-Furman Florida capital punishment statute, however, does not purport to make death the "mandatory" punishment for any particular crime. Instead, after a defendant has been convicted of a capital crime, the trial court has effective discretion to impose a sentence of life imprisonment or death in any case. This sentencing scheme confirms rather than eliminates the arbitrary selectivity declared unconstitutional in Furman v. Georgia. As Mr. Justice Ervin, dissenting from the Florida Supreme Court's decision upholding the constitutionality of the statute, pointed out:

> " 'all past efforts "to identify before the fact" the cases in which the penalty is to be imposed have been "uniformly unsuccessful" . . . . One problem is that "the factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula . . . " Report of the Royal Commission on Capital Punishment. 1949-1953, Cmd. 8932, §498 [p. 174] (1953). As the Court stated in McGautha, [McGautha v. California, 402 U.S. 183 (1971)] "[t]he infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need." 402 U.S., at 208, 91 S.Ct., at 1468 . . . . Thus, unless the Court in McGautha misjudged the experience of history, there is little reason to believe that sentencing standards in any form will substantially alter the discretiionary character of the prevailing system of sentencing in capital cases.' "

State v. Dixon, supra, 283 So.2d at 17 (footnote omitted)

(quoting the dissenting opinion of Mr. Chief Justice Burger, Furman v. Georgia, supra, 408 U.S. at 401).

35/ Other discretionary jury decisions may also spare the life of a capital offender. A jury may convict of a non-capital attempt, Fla. R. Crim. P. 3.510 (1974-1975 supp.); it may recognize an amorphously defined defense such as insanity, see, e.g., Davis v. State, 44 Fla. 32, 32 So. 822 (1902); Perry v. State, 142 So.2d 528 (Fla.App. 1962), or self-defense, see, e.g., Linsley v. State, 88 Fla. 135, 101 So. 273 or mititagation such as intoxication, see e.g., Gardner v. State, 28 Fla. 113, 9 So. 835 (1891); it may find that a homicide is justifiable, see Fla. Stat. Ann. §782.02 (1974-1975 supp.); or excusable, see Fla. Stat. Ann. §782.03 (1965); or it may simply refuse to convict in spite of the evidence -- a not infrequent phenomenon when the death penalty is involved, see Knowlton, Problems of Jury Discretion in Capital Cases, 101 U. PA. L. REV. 1009, 1012 n.18 (1953).

The trial judge, rather than the jury, makes the final determination of the sentence to be imposed on a capital offender. But his discretion is no less absolute or arbitrary than was the jury's under Florida's former procedure. 36/ The provision for an advisory jury verdict here merely intruduces additional uncertainties into the sentencing procedure. 37/ The trial judge is clearly supposed to consider the advisory verdict, yet the statutes does not specify what weight he is to give it or what circumstances the jury's recommendation may be overruled. Since the jury does not return a written verdict specifying the aggravating and mitigating circumstances it has considered and found, it is impossible for a trial court to relate the verdict to the sentencing scheme outlined by the new Florida statute. 38/ The jury's sentencing recommendation is

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36/ This Court has already made clear that the principles of Furman applies to sentencing by judges as well as by juries. See e.g., Alvarez v. Nebraska, 408 U.S. 939 (1972); Miller v. Maryland, 408 U.S. 934 (1972); Steigler v. Delaware, 408 U.S. 939 (1972).

37/ "In point of fact, a death sentence could be imposed although the entire twelve member jury had recommended a life sentence. Likewise, the judge could impose a life sentence although the entire jury had recommended death.

Under the old system, a majority of the twelve member jury jury, in the exercise of their discretion, determined the nature of the punishment. Under the new law, to the exercise of that discretion is added the opportunity for the arbitrary, completely unfettered, and final exercise of discretion by the judge. Clearly, the new law provides for even more discretion than the quantum thereof condemned in Furman."

State v. Dixon, supra, 283 So.2d at 26 (dissenting opinion of Mr. Justice Boyd).

38/ "[T]he provision for a jury recommendation in the Florida Capital Punishment Act introduces unnecessary discretion into the sentencing procedure because the statute gives no guidance regarding the advisory sentence's relevance. Apparently, the trial judge should give great weight to the advisory sentence, but this is not clear from the statute. If the legislature did not intend the advisory sentence to be important, then the jury's participation in the sentencing hearing would be senseless and expensive extravagance. The further provision that a penalty jury be empaneled, even if there was no jury at the guilt trial, does seem to indicate that the legislature intended the trial judge to pay deference to the jury's recommendation. Regardless of the weight that the legislature intended the trial judge to give to the jury advisory sentence, however, there is another reason why the advisory sentences are problematic: they do not report the jury's underlying reasons for the sentencing decision reached."

an enigmatic "yes" or "no" on the question whether a capital defendant should be killed, and the trial judge must speculate to divine the underlying basis of the verdict.[39]

Moreover, the statutory aggravating and mitigating circumstances are extremely vague and susceptible to varying application by various jurors and trial judges. Determinations that "[t]he capital felony was especially heinous, atrocious or cruel," that "[t]he defendant has no significant history of prior criminal activity," that "[t]he defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor,: that "[t]he defendant knowingly created a great risk of death to many persons," that "[t]he defendant acted under extreme duress or under the substantial domination of another person,: that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired," and that "[t]he age of the defendant at the

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38/ (con't) Note, Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism. 2 FLA. ST. L. REV. 108, 144 (1974) (footnotes omitted).

39/ In Taylor v. State, 294 So.2d 648 (Fla. 1974), for example, neither the trial judge nor the Florida Supreme Court undertook to fathom the jury's verdict -- the trial judge disregarding it and the Supreme Court following it with equally scant analysis of its meaning, its supportability, or the weight to be given to it. The Taylor decision itself does nothing to clarify the respective sentencing roles of the jury and the trial judge; the Florida Supreme Court there merely declares:

> "[w]e are not unmindful that the trial judge heard all the evidence offered during the trial and that at the second hearing no additional evidence was advanced in aggravation, nor in mitigation. However, his immediate rejection of the jury's recommendation upon its return to the courtroom does not comport with the intent of the legislation."

294 So.2d at 651. See also LaMadline v. State, 303 So.2d 17, 20 (Fla. 1974), quoted at p.61 infra.

time of the crime"[40] should be considered a "mitigating circumstance" can obviously not be made with any precision, uniformity, or predictability.[41] The very effort of the the Florida Supreme Court to clarify these provisions illustrates this difficulty:

> "[t]he use of the adjectives 'great' and 'many' is attacked as vague, but we feel that a man of ordinary intelligence and knowledge easily conceives the concepts involved.
>
> The aggravating circumstance which has been most frequently attacked is the provision that commission of an especially heinous, atrocious or cruel captial felony constitutes an aggravated capital felony. Fla. Sta. §921.141(6)(h), F.S.A. Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

40/ In State v. Dixon, supra, 283 So.2d at 10 (emphasis supplied), the Florida Supreme Court explicated this provision in the following fashion:

> "the Legislature has chosen to provide for consideration of the age of the defendant--whether youthful, middle aged, or aged--in mitigation of the commission of an aggravated capital crime. The meaning of the Legislature is not vague, and we cannot say that such a consideration is unreasonable per se. Any inappropriate application by a jury of the standard under the facts of a particular case may be corrected by the Court."

The Court did not, however, define the age "standard" or describe the manner in which it would "correct" "inappropriate applications" of this mitigating circumstance.

41/ See Ehrhardt & Levinson, Florida's Legislative Response to Furman: An Exercise in Futility? 64 J. CRIM. L., CRIM. & POL. SCI. 10, 17-18 (1973).

State v. Dixon, supra, 283 So.2d at 9. The "norm of capital felonies," of course, is a standard comprised of all first degree murders and rapes of children below the age of eleven.

In this context, the breadth of the several statutory aggravating and mitigating circumstances is no less striking than their vagueness. Under Florida's sentencing "standards," any defendant convicted of a capital crime can plausibly be sentenced to death -- or alternatively to life imprisonment. As the Florida Supreme Court itself recognized: "[t]o a layman, no capital crime might appear to be less than heinous." State v. Dixon, supra, 283 So.2d at 8.[42] To authorize the death penalty for a first degree murder (or rape of a child under the age of eleven) in terms of unmeasurable degrees of heinousness -- or of atrocity, or of cruelty -- therefore hardly constricts or controls the scope of sentencing discretion in any meaningful way.[43]

42/ To be sure, the Court's opinion proceeds to state that the trial judge's power to overrule the jury's recommendation will correct for laymen's outrage at capital crime:

> "a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard [of] criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience."

State v. Dixon, supra, 283 So.2d at 8. As indicated above, however, the trial court's discretionary authority to overrule the jury appears to have increased rather than alleviated the harshness of jury verdicts, since in the cases of at least 16 of the inmates now on Florida's Death Row the sentencing jury recommended mercy but the trial judge imposed a death sentence.

43/ In Spinkellink v. State, 313 So.2d 666 (Fla. 1975) the Florida Supreme Supreme Court affirmed a death sentence for first degree murder on the ground that a robbery-murder was "heinous, atrocious, or cruel." Defendant killed the deceased by shooting him twice with the deceased's pistol. As the majority opinion notes, the defendant had become aware of the deceased's "vicious propensities when the latter forced . . . [defendant] to have homosexual relations with him, when the latter played 'Russian Roulette' with him and boasted of killing a fellow inmate while in prison." Id. at 688. The

Although the Florida Supreme Court recently stated that "the propounding of aggravating and mitigating circumstances . . . must be determinative of the sentence imposed," Alford v. State, 307 So.2d 433 (Fla. 1975)(App. D, infra), see also State v. Dixon, supra, 283 So.2d at 8, it has held that the aggravating circumstances which justify a death sentence need not be those specified in §921.141. In Sawyer v. State, 313 So.2d 680 (Fla. 1975)(attached as App. C), the trial court overruled a jury recommendation of a life sentence and imposed a death sentence partially on the basis of information which had not been presented to the jury. The trial judge's opinion listed six "additional facts which the jury did not have during

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43/ (con't) deceased took all of defendant's money, id., and defendant went to retrieve it. Defendant testified that he had been forced to kill the deceased in self defense when the latter attacked him. Id. "Admittedly, the evidence clearly shows that the deceased was an individual of vicious temperament." Id. at 670. Mr. Justice Ervin summarized in dissent:

> "[i]n this case it appears that Appellant at the time of the homicide was a 24-year-old drifter who picked up Szymankiewicz [the deceased], a hitchhiker. Both had criminal records and both were heavy drinkers. Szymankiewicz, the victim in this case, was a man of vicious propensities who boasted of killings and forced Appellant to have homosexual relations with him. Appellant discovered that Szymankiewicz had 'relieved him of his cash reserves.'
>
> It was under these conditions that Appellant returned to the motel room where the homicide occurred. Appellant testified he shot Szymankiewicz in self defense. Evidence to the contrary was only circumstantial. In fact, only through such evidence was it possible to infer the crime was premeditated and different from Appellant's direct testimony that he shot Szymankiewicz in self defense. The reasoning of this Court on the suddenness in which premeditation may be formed is suspect and allowed the prosecution undue latitude to readily shift from the theory of felony murder to premeditated murder.
>
> It does not appear to me that in this situation there was sufficient certainty of premeditated guilt and heinousness to warrant the death penalty. When the nature of the relation between Appellant and Szymankiewicz is taken into account, along with the viciousness of the victim's character and this theft of Appellant's money, it is obvious that hostility existed between them that could have produced a mortal encounter that involved self-defense shooting." Id. at 671-675.

their deliberation on the advisory sentence,; Sawyer, at 681 3c, to justify imposition of the death sentence. The Florida Supreme Court recast these findings in terms of "aggravating circumstances" (although not "aggravating circumstances" iterated in §921.141) and affirmed appellant Sawyers death sentence:

> "[w]e find that the aggravating circumstances including (1) the facts of the armed robbery incident; (2) the prior record, including the commission of multiple robberies; (3) the fact that the appellant was a hard drug user, requiring the expenditure of $200.00 per day; and (4) the specific finding of threats and reprisals against persons involved in the trial and prosecution of the appellant and the appellant's violent temper, taken together, are more than adequate to justify the imposition of the death penalty in this cause."

Sawyer, at 682. The number of factors in aggravation and mitigation which the jury and trial judge may consider is thus unlimited. Section 921.141 does "no more than suggest some subjects for the jury to consider during its deliberations." McGautha v. California, 402 U.S. 183, 207 (1971).

Ultimately, the manner of weighing the statutory factors and determining their "sufficiency" is left to the undirected discretion of jurors and trial judges.

"The majority in Dixon stated that 'the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances' . . . . [283 So.2d at 10] But if it is not a counting process, what is it? Whitout some legislative formulation of the combination of circumstances that justify executing or not executing a defendant, the decision to execute is a function of the sentencer's discretion and nothing more. There are three reasons why the mere requirement that the sufficiency of the aggravating and mitigating circumstances be weighed does not effectively limit the sentencer's discretion. First, nowhere in the statute is the meaning of the word 'sufficient' developed, yet it is obviously the core of the matter. Secondly, the statute fails to assign, or even indicate, the relative weights of the various enumerated circumstances. Finally, the statute does not ordain what combination of mitigating circumstances will outweigh what combination of aggravating circumstances." 44/

44/ Note, Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism, 2 FLA. ST. L. REV. 108, 139-140 (1974) (footnotes omtted). The Dixon majority did rule that aggravating circumstances must be proved by the State beyond a reasonable doubt. State v. Dixon, supra, 283 So.2d at 9. But it did not allocate or define the burden of proof with regard to mitigating circumstances, simply leaving the sentencer "free to exercise unguided discretion when finding mitigating circumstances." Note, supra, 2 FLA. ST. L. REV. at 141.

Since the permutations of appraising "aggravating" and "mitigating" factors are limitless, one trial jusge may find a particular aggravating circumstance "sufficient" to outweigh three or four designated mitigating circumstances, while another judge may view the identical circumstances differently. The same -- or rationally undifferentiable -- facts may be treated as a sufficient basis for a death sentence in one courtroom, and as insufficient in another room or on another day. And one sentencer may find that "aggravating" circumstance A outweighs "mitigating" circumstance B in the light of other, nonstatutory circumstances that another sentencer would disregard or overlook, or which would cause another sentencer to come down on the side of life instead of death.

This procedure is utterly unfitted to "reserve [the] . . . application [of capital punishment] to only the most aggravated and unmitigated of [the] most serious crimes." State v. Dixon, supra, 283 So.2d at 7. Rather, the Florida legislature has authorized the infliction of the "sentence of death under [a] legal system that permit[s] this unique penalty to be . . . wantonly and . . . freakishly imposed" 46/ with only nominal reference to the ostensible statutory scheme of aggravating and mitigating circumstances.

3. Post-Sentence Selective Mechanisms

i. Appellate Review

Death sentences imposed under the new Florida statute are automatically reviewed by the Florida Supreme Court. Fla. Stat. Ann. §921.141(4) (1974-1975 supp.). As conceived in State v. Dixon, supra, this appellate review is intended to provide one of several "concrete safeguards beyond those of the trial system to protect [a defendant] . . . from death where a less harsh punishment might be sufficient." Id., 283 So.2d at 7.

46/ Furman v. Georgia, supra, 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart).

> "[T]he sole purpose of . . . [this review] is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes."

Id., 283 So.2d at 8. However, no statutory standards of appellate review are provided; and, in light of long-standing Florida traditions against appellate revision of substantive sentencing discretion, the scope of review by the Florida Supreme Court is exceedingly unclear. Without the articulation of any standards, the enunciation of a reasoned opinion on the sentencing question, a discussion of the factual elements justifying (or failing to justify) the sentence in the particular case, and an analysis of the sentence imposed in comparable cases,[49] it is obviously impossible to ascertain whether or not the imposition and affirmance of a death sentence in a particular case is arbitrary and whether death is indeed being inflicted "for only the most aggravated, the most indefensible of crimes." State v. Dixon, at 7.

There is no appellate review of a trial judge's imposition of a life sentence in a capital case. Even if this sentence is arbitrary, atypical, or discriminatory, it cannot be modified on appeal. Consequently, another "infirmity in Florida's appellate review provision is that review by the supreme court cannot protect against arbitrary mitigation of the death penalty at the trial court level . . . . [E]ven if all those executed are found by the supreme court to be guilty of the most

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49/ As the Florida Supreme Court noted in State v. Dixon, supra, 283 So.2d at 8: "[c]ases involving life imprisonment are not . . . directly reviewable by [the Florida Supreme] . . . Court, and the District Courts of Appeal [are] . . . not . . . empowered to overturn the trial judge on the issue of sentence." Cases appealed to the Florida Supreme Court will therefore provide no reliable guide to whether the death penalty is being uniformly imposed under similar factual circumstances, since cases involving a sentence of life imprisonment may never be reviewed at all in that Court. Moreover, neither theFlorida Supreme Court or the Court of Appeal is authorized to impose a death sentence or to vacate a life sentence and remand for resentencing in the event a life sentence is irrationally or arbitrarily imposed.

'aggravated' and 'indefensible' crimes, some of those spared at the trial court level may also be guilty of that same quality of criminal activity."[50] pretermitting, then, the question whether appellate review of any sort could save unregulated and arbitrary trial-level death-sentencing decisions from the ban of Furman,[51] it is manifest that the sort of review provided and practiced under the present Florida statute is wholly ineffective for that purpose.[52]

50/ Note, Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism, 2 FLA. ST. L. REV. 108, 147 (1974)(footnotes omitted).

51/ If the trial procedures afforded by the Florida capital punishment statute are arbitrary in violation of the Eighth Amendment rights of capital defendants, it is questionable whether any appellate procedures can rectify the error. "The law itself must save the parties' rights, and not leave them to the discretion of the courts as such." Louisville & Nashville Ry. Co. v. Central Stock Yards Co., 212 U.S. 132, 144 (1909). Five years later, Justice Holmes cited this quotation from the Central Stock Yards case and concluded: "[t]he point there was that a defect in a law could not be cured by precautions in a judgment." International Harvester v. Kentucky, 234 U.S. 216, 220 (1914).

52/ Concurrently with Furman and upon its authority, this Court vacated numerous death sentences that had been reviewed by state appellate courts and sustained on the express ground that the facts and circumstances of the case warranted the extreme penalty. See, e.g., Alford v. Eyman, 408 U.S. 939 (1972)(see State v. Alford, 98 Ariz. 124, 402 P.2d 551, 557 (1965); Ariz.Rev. Stat., §13-1717); Hurst v. Illinois, 408 U.S. 935 (1972) (see People v. Hurst, 42 Ill.2d 217, 247 N.E.2d 614 (1969)); Alvarez v. Nebraska, 408 U.S. 937 (1972)(see State v. Alvarez, 182 Neb. 358, 154 N.W. 2d 746, 748 (1967); Neb. Rev. Stat., §29-2308); Fesmire v. Oklahoma, 408 U.S. 935 (1972)(see Fesmire v. State, 456 P.2d 573, 586-587 (Okla. Ct. Cr. App. 1969)); Phelan v. Brierly, 408 U.S. 939 (1972) (see Commonwealth v. Phelan, 427 Pa. 265, 234 A.2d 540 (1967); cf. Commonwealth v. Hough, 358 Pa. 247, 56 A.2d 84, 85-86 (1948), with Commonwealth v. Edwards, 380 Pa. 52, 110 A.2d 216, 217 (1955). The Court vacated death sentences coming from these States even though the same state appellate courts had a regular and recent practice of reversing death sentences when such sentences were found to be unwarranted upon a consideration of aggravating and mitigating circumstances. See, e.g., State v. Maloney, 105 Ariz. 348, 464 P.2d 793 (1970); People v. Crews, 42 Ill.2d 60, [illegible] N.E.2d 593 (1969); State v. Hall, 176 Neb. 295, 125 N.W.2d [illegible] (1964); Lewis v. State, 451 P.2d 399 (Okla. Ct. Crim. App. 1969); Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959).

ii. Executive Clemency

The Governor, with the "approval of three members of the cabinet" may be executive order commute a death sentence to a sentence of life imprisonment.[53/] Although Florida Governors must report their grants of clemency to the legislature,[54/] there are no standards whatsoever for the exercise of the commutation power. The reduction of a legally authorized sentence is committed to the unfettered discretion of the executive branch. Davis v. State, 123 So.2d 703, 711 (Fla. 1960); LaBarbara v. State, 63 So.2d 654, 655 (Fla. 1953); Johnson v. State, 61 So.2d 179 (Fla. 1952); Sawyer v. State, 148 Fla. 542, 4 So.2d 713 (1941); Chavigny v. State, 112 So.2d 910, 915 (Fla. App. 1959). The executive has "broad and wide discretion in . . . commuting punishments," Ex Parte White, 161 Fla. 85, 178 So. 876, 880 (1938) -- so much so that the Florida Supreme Court has declared unconstitutional a statute which required the Governor and his cabinet (who constituted the Board of Pardons under the 1885 Constitution) to afford clemency any time the Court affirmed a death sentence by an equally divided Court. Ibid. One study of clemency in capital cases between 1960 and 1962 revealed 9 executions and 3 commutations of death sentences to life imprisonment druing this period.[55/] There appears no reason to assume that the 25% clemency rate is atypical or will decrease under the new Florida capital procedures; and doubtless, a significant albeit irrationally selected portion of

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53/ Fla. Const. Art. 4, §8(a) (1968 rev.).

54/ Fla. Stat. Ann. 940.01 (1973).

55/ Note, Executive Clemency in Capital Cases, 39 N.Y.U. L. REV. 136, 191 (1964).

capital defendants will continue to be spared through the exercise of executive clemency.[56/]

This analysis of Florida's post-Furman capital punishment procedure demonstrates that the arbitrary selectivity condemned in Furman has been carefully preserved by the State's new death penalty statute. Discretionary opportunities for imposition or avoidance of the extreme penalty are, in fact, as numerous and as unregulated as in the pre-Furman period. A substantial Eighth Amendment question of literally vital importance to petitioner is thus presented by the Florida Supreme Court's affirmance of his death sentence under the new statutory procedure.

56/ Another way in which the Governor may avoid or permit the imposition of a death sentence, quite separate from granting clemency, is provided by Fla. Stat. Ann. §922.07 (1973). If the Governor is informed that a condemned defendant "may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person." §922.07(1). After receiving the commission's report, the Governor may determine "that the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him", §922.07(a) and issue a death warrant, or he may determine that the convicted person lacks this mental capacity, §922.07(3), and issue an order committing him to the state hospital for the insane. See Ex parte Chesser, 93 Fla. 291, 111 So. 720 (1927); Hysler v. State, 136 Fla. 563, 187 So. 261 (1939). This determination is committed entirely to the discretion of the Governor, and no provision is made for any participation by the condemned defendants (except for the representation by counsel during the psychiatric examination) or for judicial review of the Governor's decision. Since §922.07(4) provides that when a defendant "has been restored to sanity", he may be executed, the motivation of any "insane" condemned man to regain mental health appears highly questionable. Some might be sane enough to feign insanity and thus postpone electrocution. Others might be crazy enough to cure themselves into oblivion. The outcome in any particular case will, of course, be ultimately determined by the discretionary decision of the Governor.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

RESPECTFULLY SUBMITTED,

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TENTH JUDICIAL CIRCUIT
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DENNIS P. MALONEY
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Clearly, a municipality or other governmental authority in this state can properly condemn lands for parking facilities. Because of the possible consideration of respondent-Authority to lease the air rights above the parking facility for a shopping mall, the majority holds that this is the primary purpose for the project. There is no justification for that holding in the record. The record fails to show (a) any official action on the part of respondent to authorize a shopping mall; (b) any official action on the part of respondent to approve plans and specifications for a shopping mall; and (c) any official action on the part of respondent authorizing its officers and employees to enter into an agreement with private enterprise for the construction of a shopping mall. Even assuming that there were such authorization, I cannot understand the logic and reasoning which requires the project to be defeated for that reason. To do so is hypocritical. The majority is, in effect, saying it is all right to build a parking facility in the downtown area to serve 25 to 50 or more surrounding shops, but it is improper to build a parking facility which will serve not only the surrounding retail establishments but those retail establishments built on the deck of the parking facility and which would help pay for the facility. I see no difference. The purpose is to provide public parking for downtown retail establishments.

I further agree with the contention of the respondent that the successful collateral challenge made by the petitioner to the prior validation of the bonds for this project will cause confusion which will sweep the bond markets that deal in bonds of Florida communities, particularly those that are for downtown redevelopment purposes. The majority opinion, in effect, says that the bonds were improperly validated for a public purpose.

With reference to the appellate attorney's fees for the petitioners in this cause, it is my opinion that attorney's fees of this magnitude should not be considered summarily upon affidavits only.

I am further disturbed that the majority has allowed the petitioner to file as a part of the record in this cause a newspaper article published five months after the decision of the trial court and testimony of an appraiser which occurred not only subsequent to the trial court's order in this matter but subsequent to the Fourth District Court's opinion in this cause.

For the reasons expressed herein, I would deny the petition.

Charles William PROFFITT, Appellant,
v.
STATE of Florida, Appellee.
No. 43541.
Supreme Court of Florida.
May 23, 1975.
Rehearing Denied Aug. 13, 1975.

Cause came before the Supreme Court on direct appeal from death sentence imposed by the Circuit Court, Hillsborough County, Walter N. Burnside, Jr., J. The Supreme Court held that where conversation between defendant and his wife in mobile home was readily discernible in bedroom rented to witness and defendant either knew or should have known that he was going to be overheard, privileged character of communication between defendant and his wife was lost; that admission of witness' testimony did not violate hearsay rule; that trial court did not err in permitting counsel for prosecution to comment during closing argument on possible explanation for conflicting testimony dealing with shirts worn by assailant.

Affirmed.

1A

1. Witnesses ⇐270(2)

In homicide case, refusal to allow defense counsel on cross-examination to pursue questions dealing with whether victim was dealer in marijuana and whether his death was result of those dealings was not improper, where counsel was not attempting to impeach or discredit witness and such testimony would have confused ultimate issue and impaired fairness of trial.

2. Criminal Law ⇐1170½(1)

Any error in State's recalling witness who had stepped down was harmless, where witness had remained sequestered, he had not mingled with public generally and information solicited on recall was not critical to either State's case or prejudicial to defendant. West's F.S.A. §§ 59.041, 924.33.

3. Witnesses ⇐184(1)

Generally, testimony of third party who overhears confidential communication is admissible.

4. Witnesses ⇐188(1)

Privilege of nondisclosure between husband and wife attaches to conversation or communication itself and protects it from exposure in evidence, wherever or in whosesoever hands it may be.

5. Witnesses ⇐198(1)

Privilege of nondisclosure between attorney and client attaches to conversation or communication itself, and protects it from exposure in evidence wheresoever or in whosesoever hands it may be.

6. Witnesses ⇐193

Where conversation between defendant and his wife in mobile home was readily discernible in bedroom rented to witness and defendant either knew or should have known that he was going to be overheard, privileged character of communication between defendant and his wife was lost and that privilege did not preclude admission in murder case of witness' testimony that defendant had said that he had stabbed and killed a man during an attempted robbery and had beaten a woman.

7. Criminal Law ⇐364(6)

Witness' testimony that she overheard defendant in conversation with another state that he had stabbed and killed a man during attempted robbery was within res gestae exception to hearsay rule, where it was made within 30 minutes after commission of homicide at time when defendant was making hasty preparations for leaving state.

8. Criminal Law ⇐720(9)

In homicide case in which victim's wife described assailant as wearing white pin-striped shirt and defendant's drinking companion stated that defendant had been wearing a short sleeved white shirt with emblem on night of killing, prosecutor was properly permitted to comment during closing argument on possible explanation of conflicting testimony dealing with shirt.

9. Criminal Law ⇐351(3)

Generally, a defendant's leaving at time which could have been after crime, although at an unusual hour is, standing alone, no more consistent with guilt than with innocence.

10. Criminal Law ⇐777

Court did not err in instructing jury on question of whether guilt could be inferred from flight, where in addition to flight itself, there was uncontroverted, unimpeached testimony of witness that she overheard defendant state in conversation with his wife that he had stabbed and killed a man.

11. Criminal Law ⇐722(2)

Comment made by prosecutor as to chance for rehabilitation of defendant charged with first-degree murder was not improper even though it was distasteful.

2A

James A. Gardner, Public Defender, and Robert T. Benton, II, Asst. Public Defender, for appellant.

Robert L. Shevin, Atty. Gen., and A. S. Johnston, Asst. Atty. Gen., for appellee.

PER CURIAM.

This cause is before the Court on direct appeal from the recommendation and sentencing to death of the appellant, Charles William Proffitt, by the Circuit Court of Hillsborough County, Florida. We have jurisdiction pursuant to Article V, Section 3(b)(1), Florida Constitution.

The appellant was charged by a grand jury indictment with the murder in the first degree of Joel Ronnie Medgebow by stabbing.

The evidence produced at trial established that on the morning of July 10, 1973, at about 4:45 A.M., the decedent's wife, Patricia Kay Medgebow, was awakened, apparently by her husband's moaning. She saw her husband propped up on one elbow with what later was discovered to be a knife in his hand. Suddenly, a man jumped up and struck her in the face several times fleeing through the open sliding-glass doors. Fingerprints were later found on the door, however, they did not match the appellant's prints. The decedent's wife gave a description of the assailant but, at trial, she was unable to identify the appellant as the man who struck her on the morning of the homicide. In her description of the assailant, she claimed that he was wearing a white pin-striped shirt and either brown or grey trousers. She stated that on the evening prior to the killing she had shared a marijuana cigarette with four other people.

The testimony of Michael Charles Seary, appellant's coworker, was presented to show that on the night preceding and during the morning prior to the homicide, the appellant and Seary had been out drinking until 3:30 or 3:45 A.M., and that the appellant had driven Seary home, had a brief conversation and left. Seary also stated that at the time, the appellant was wearing a short-sleeved, white Maas Brothers' shirt with a blue oval emblem over the left breast, and grey trousers.

Further testimony revealed that the appellant and his wife lived in a two-bedroom mobile home, renting the other bedroom to a Mrs. Mary Helen Bassett and her infant daughter. Mrs. Bassett testified that on the evening prior to the homicide she had waited up with the appellant's wife for his return until approximately 1:00 A.M., but finally retired prior to his arrival. Over defense counsel's objection, she testified that she was awakened about half past five on the morning of July 10, 1973, and overheard a conversation between the appellant and his wife. She admitted that she did not hear the complete unbroken conversation, hearing only intermittent segments. She stated that she heard the appellant say that he had stabbed and killed a man during an attempted robbery and that he had beaten a woman. Mrs. Bassett also stated that she had not seen the appellant during the conversation but that she had recognized his voice.

Mrs. Proffitt, appellant's wife, testified that on the evening prior to the homicide, her husband had gone to work dressed in a white Maas Brothers' shirt and grey pants and returned from work at about a quarter past five the next morning wearing the same shirt and pants but was at that time barefooted.

A droplet and a smear of human blood were found on the Maas Brothers' shirt, however, the quantity was insufficient to type. The blood found on the knife was shown to be the same type as that of the victim but no fingerprints were detectable.

Upon this evidence, the jury found the defendant guilty as charged. The second half of the bifurcated proceeding was held, at which time it was shown that the appellant had been convicted in 1967 of the

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crime of breaking and entering without permission. In addition, the evidence adduced at trial was reiterated and the jury then retired to consider the recommendation of sentence. Upon returning, the jury recommended that the death penalty be imposed. The trial judge then ordered a mental examination of the defendant to determine his mental condition then and at the time of the homicide. The examination revealed that at the time of the commission of the homicide, the appellant was not mentally impaired.

The trial judge then sentenced the appellant to death and this appeal ensued.

[1] Appellant has raised eleven points on appeal. Each shall be treated in the order presented. The first two points are devoid of merit. Appellant first contends that the court erred in refusing to allow defense counsel to pursue questions dealing with whether the victim was a dealer in marijuana and whether his death was a result of those dealings. It is clear from reading the record that counsel for the appellant was not attempting to impeach or discredit the witness but rather was taking an expedition into immateriality. The trial judge properly exercised the broad discretion allowed him by limiting the scope of cross-examination. Baisden v. State, 203 So.2d 194 (Fla.App.1967). There is no need to speculate as to the goal of the expedition, however, it is interesting to note that in viewing the evidence sought to be admitted, the only purpose which its introduction would serve would be the confusion of the ultimate issue and the impairment of the fairness of the trial.

[2] Appellant's second alleged error challenges whether the State may recall a witness after the witness has stepped down. The record reveals that the witness had stepped down but had remained sequestered and had not mingled with the public generally. Further, the information solicited upon recall was not critical to either the State's case or prejudicial to the defendant. If any error has been committed, our review of the record clearly indicates that that error, if any, was harmless and within the purview of the statutes. (Fla.Stat., §§ 59.041 & 924.33, 1974).

Appellant's third and fourth points on appeal relate to the admissibility of the testimony of Mrs. Bassett and the challenged privileged character of the conversation she overheard between the appellant and his wife. Appellant first asserts that the record is devoid of any suggestion that either appellant or his wife had any indication that they were being overheard.

[3-5] The general rule, and clearly the weight of authority is to the effect that testimony of a third party who overhears a confidential communication is admissible. Wigmore on Evidence, Vol. VIII, § 2336. However, it has long been held in this State that privilege of non-disclosure between husband and wife and attorney and client attaches to the conversation or the communication itself, and protects it from exposure in evidence, wheresoever or in whosesoever hands it may be. Mercer v. State, 40 Fla. 216, 24 So. 154, 158 (1898). In Schetter v. Schetter, 239 So.2d 51 (Fla.App.1970), an attorney recorded a conversation he had with his client over the telephone, without telling the client until the end of the conversation. The attorney then gave the recording to a psychiatrist who later testified at a hearing which resulted in the appointment of a guardian ad litem for the client.

The thrust of the opinion in *Schetter*, reversing the admissibility of that testimony is the assertion basic to the attorney-client privilege, that is, that the communication in question must have been made in confidence. Id. at 52.

The question then in this case, however, is whether it can be determined from the record that the appellant and his wife knew or should have known that their privileged communication was being overheard or whether as the appellant asserts,

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that the record is devoid of any suggestion that the appellant or his wife had any indication that the privileged communication was being overheard. The testimony of the appellant's wife indicates that she was aware of Mrs. Bassett's presence in the trailer on the morning after the homicide. It is equally clear that the appellant knew that she was residing in the same trailer since Mrs. Bassett was paying one hundred dollars a month as rent on the room she and her infant daughter were occupying. Additionally, it is readily apparent from the record that the appellant and his wife were not attempting to keep their voices at an indiscernible level since it was their voices which must have awakened Mrs. Bassett in spite of the fact that her door was closed. The testimony of Mrs. Bassett also shows that after overhearing the conversation between the appellant and his wife, she also observed the appellant get in his car to leave. However, the testimony does not end there. It seems that after the appellant left, Mrs. Bassett emerged from her room and talked with the appellant's wife. Mrs. Proffitt expressed no surprise at seeing Mrs. Bassett nor admonished her not to reveal what she had overheard. Mrs. Proffit clearly knew that Mrs. Bassett had overheard the conversation.

[6] In examining these facts in the light of the pronouncement in *Schetter*, it is clear that there was no attempt to make the communication in confidence. It was as if Mrs. Bassett, in the other room, was privy to the conversation. There is absolutely no testimony indicating that either the appellant or his wife made any attempt, no matter how little, to keep the conversation from being overheard. It is further clear from the testimony that conversations were readily discernible in other rooms and the appellant either knew or should have known that he was going to be overheard if he was speaking over a whisper. Therefore, the privilege character of the communication was lost when they were speaking in a manner and place where they had a reasonable chance of being overheard, and they knew of that possibility at that time.

[7] Appellant also stated that the admission of Mrs. Bassett's testimony about what was said violates the hearsay rule. Upon close scrutiny, it is noted that the utterances of the appellant and his wife were made within thirty minutes after the commission of the homicide at a time when the appellant was making hasty preparations for leaving the State. It is, therefore, clear that the declaration is sufficiently contemporaneous with the event that it can be regarded as having been stimulated by the event and not by the declarant's deliberation and thus within the res gestae exception. Lawrence v. State, 294 So.2d 371 (Fla.App.1974); See: Wharton's Criminal Evidence, Vol. 2, § 297. By contrast, where the communication was heard through admitted eavesdropping by use of an extension telephone receiver without knowledge of either of the parties to the conversation, see Horn v. State, 298 So.2d 194 (Fla.App.1974).

[8] Appellant's fifth point relates to whether the court erred in permitting counsel for the prosecution to comment during closing argument on a possible explanation of the conflicting testimony dealing with the shirt worn by the assailant. This point has no merit since there were clearly facts in evidence tending to show that there was the possibility, however remote, of two different shirts having been involved, and the court correctly exercised its discretion in permitting the comment.

[9, 10] Appellant next raises the question of whether the court erred in instructing the jury on the question of whether guilt could be inferred from flight. The general rule in Florida as correctly pointed out by the appellant is to the effect that the defendant's leaving at a time which could have been after the crime, although at an unusual hour, is, when standing alone, no more consistent with guilt than

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with innocence. Harrison v. State, 104 So.2d 391 (Fla.App.1958).

However, in the case at bar, there exists significantly more evidence in the record than flight standing alone. There is the uncontroverted, unimpeached testimony of Mrs. Bassett. There is the phone call to the police by the defendant's wife and, finally, there is the flight itself. Thus, it is clear that under the facts in this case, the court was correct in instructing the jury on flight. See: Williams v. State, 268 So.2d 566 (Fla.App.1972).

The seventh point raised on appeal by the appellant deals with whether the court erred in instructing the jury on felony murder. Our review of the record indicates that the trial court correctly instructed the jury on the elements of the felony murder rule. The appellant seems to be challenging prosecution's commenting on felony murder. However, we can find no reversible error on this point.

[11] As to appellant's eighth, ninth and tenth points on appeal, we find no reversible error. The eighth point, dealing with the excusing of a juror because of preconceived notion about the death penalty, has been discussed and disposed of many times. Campbell v. State, 227 So.2d 873 (Fla. 1969) et seq. Point nine relates to another comment made by counsel for the prosecution as to the chance for the rehabilitation of the appellant. Although a distasteful comment, appellant has not cited any authority holding such comment error. The crime in this case is distasteful, but to some extent fair comment is distasteful. We, therefore, again find no reversible error.

Appellant's tenth point concerns whether the trial court did not consider evidence in mitigation when it sentenced the appellant to death. The trial court has carefully set forth all the circumstances in this case, to-wit:

"AS TO AGGRAVATING CIRCUMSTANCES:

(A) That the Defendant, CHARLES WILLIAM PROFFITT, murdered JOEL RONNIE MEDGEBOW from a premeditated design and while the Defendant, CHARLES WILLIAM PROFFITT, was engaged in the commission of a felony, to-wit: burglary.

(B) That the Defendant, CHARLES WILLIAM PROFFITT, has the propensity to commit the crime for which he was convicted, to-wit: Murder in the First Degree and is a danger and menace to society.

(C) That the murder of JOEL RONNIE MEDGEBOW by the Defendant, CHARLES WILLIAM PROFFITT, was especially heinous, atrocious and cruel.

(D) That the Defendant knowingly through his voluntary and intentional acts leading up to and during the course of the commission of the offense for which he was convicted created a great risk to serious bodily harm and death to many persons.

AS TO MITIGATING CIRCUMSTANCES:

The Court finds that the enumerated mitigating circumstances set forth in F. S. 921.141[6](7) are primarily negated, in that,

(A) The Defendant, CHARLES WILLIAM PROFFITT, was convicted in 1967 of Breaking and Entering without permission.

(B) That the capital felony for which the Defendant, CHARLES WILLIAM PROFFITT, was convicted was not committed while the Defendant, CHARLES WILLIAM PROFFITT, was under the influence of extreme mental or emotional disturbance.

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(C) That the victim, JOEL RONNIE MEDGEBOW, was *not* a participant in the Defendant's conduct nor did the victim, JOEL RONNIE MEDGEBOW, consent to the act.

(D) That the Defendant, CHARLES WILLIAM PROFFITT, was the only participant in the capital felony for which he has been convicted.

(E) That the Defendant, CHARLES WILLIAM PROFFITT, did *not* act under extreme duress during the commission of the offense nor was he, during that period of time under the substantial domination of another person.

(F) That at the time of the commission of the offense the Defendant's capacity to appreciate the criminality to the requirements of law was *not* substantially impaired.

(G) The age of the Defendant, CHARLES WILLIAM PROFFITT, to-wit: age 28 years, has no particular significance and therefore is not a mitigating circumstance."

We must obviously conclude that no error was committed.

Finally, as to the appellant's eleventh point, whether the death penalty is cruel and unusual punishment, we note that this argument is meant to preserve the point for appeal, however, we are bound by our earlier pronouncement in State v. Dixon, 283 So.2d 1 (Fla.1973).

After carefully reviewing the record and briefs and after oral argument of the parties, we find that no reversible error has been shown and, therefore, the decision of the circuit court should be and is hereby affirmed.

It is so ordered.

ADKINS, C. J., ROBERTS, BOYD, McCAIN and OVERTON, JJ., and DUVAL, Circuit Judge, concur.

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SOUTHERN REPORTER

VOLUME 283. SECOND SERIES

STATE of Florida, Appellant,

v.

Carl DIXON et al., Appellees.

STATE of Florida, Plaintiff,

v.

Samuel D. SETSER, Defendant.

STATE of Florida, Plaintiff,

v.

Fred Elson HUNTER and James Calvin Moore, Defendant.

STATE of Florida, Plaintiff,

v.

Richard L. SHEPPARD, Defendant.

Nos. 43521, 43460, 43478 and 43473.

Supreme Court of Florida.

July 26, 1973.

Rehearing Denied Oct. 10, 1973.

Proceedings on appeal from Circuit Court, Dade County, Paul Baker, J., and certified questions from Circuit Courts of Orange County, Maurice M. Paul, J., Duval County, Everett R. Richardson, J., and Dade County, Gene Williams, J., involving validity of statute providing for death penalty. The Supreme Court, Adkins, J., held that statute imposing death penalty was valid, and that statutes defining first and second-degree murder created two separate and distinct offenses.

Certified questions answered, decision reversed, and causes remanded.

Ervin, J., filed dissenting opinion.

Boyd, J., filed dissenting opinion.

1. Criminal Law ⇐1219

United States Supreme Court decision holding unconstitutional certain state statutes authorizing death penalty did not abolish capital punishment.

2. Criminal Law ⇐1206(1)

Mere presence of discretion in sentencing procedure cannot render procedure violative of United States Supreme Court decision invalidating certain state statutes imposing death penalty.

3. Criminal Law ⇐1206(1)

Capital punishment is not, per se, violative of United States Constitution or Florida Constitution.

4. Criminal Law ⇐1206(3)

Term "heinous" as used in statute defining aggravating circumstance authorizing death penalty means extremely wicked or shockingly evil. F.S.A. § 921.141.

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law ⇐1206(3)

Term "atrocious" as used in statute setting forth aggravating circumstances authorizing death penalty means outrageously wicked and vile. F.S.A. § 921.141.

See publication Words and Phrases for other judicial constructions and definitions.

6. Criminal Law ⇐1206(3)

Term "cruel" as used in statute relating to aggravating circumstances authorizing death penalty means designed to inflict high degree of pain with utter indifference to, or even enjoyment of, suffering of others. F.S.A. § 921.141.

See publication Words and Phrases for other judicial constructions and definitions.

7. Homicide ⇐18(1)

Statute which provided that murder committed in perpetration of or attempt to perpetrate any one of specified violent felonies was murder of second degree and statute which defined murder committed by person engaged in perpetration of or in attempt to perpetrate any of same violent felonies was murder in first degree established two separate distinguishable degrees of crime, depending on presence of defendant as principal in first or second degree. F.S.A. § 782.04(1)(a), (2).

8. Criminal Law ⇐1206(1)

Florida statutes providing for imposition of death penalty in certain specified cases and providing procedure for determining whether death penalty should be imposed were constitutional. F.S.A. § 921.141.

Robert L. Shevin, Atty. Gen., Raymond L. Marky and George R. Georgeff, Asst. Atty. Gens., for appellant and plaintiff.

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Louis O. Frost, Jr., Public Defender, and Charles C. Adams, Asst. Public Defender, for defendant-Hunter.

Elliot Zisser, of Zisser & Zisser, Jacksonville, for defendant-Moore.

Philip Carlton, Jr., Miami, for defendant-Sheppard.

Tobias Simon, Miami, Jack Greenberg, Jack H. Himmelstein, Elaine R. Jones, Lynn Walker, New York City, Anthony G. Amsterdam, Stanford, Cal., for amicus curiae N.A.A.C.P. Legal Defense and Educational Fund, Inc.

James T. Russell, Clearwater, and David H. Bludworth, West Palm Beach, for amicus curiae, Florida Pros. Attys. Ass'n, Inc.

ADKINS, Justice.

These cases pose several questions arising from the possibility of the imposition of the penalty of death pursuant to Fla. Stat. § 921.141, F.S.A., which became effective December 8, 1972.

Four cases are here consolidated on the issue of the constitutionality of the capital punishment statutes of the State of Florida. The case of State v. Setser is before this Court on the basis of a certified question from the Circuit Court of Dade County. The case of State v. Hunter and Moore is before this Court on the certified question of the Circuit Court for Duval County. The case of State v. Sheppard is before this Court on the certified question of the Circuit Court for Orange County. We have jurisdiction to determine the questions certified pursuant to Fla.Const.,

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art. V, § 3(b)(3), F.S.A. The case of State v. Dixon, Lester and Sawyer is before this Court on appeal from a decision of the Circuit Court for Dade County that Fla.Stat. §§ 775.082, 921.141, F.S.A., are unconstitutional. We have jurisdiction pursuant to Fla.Const., art. V, § 3(b)(1), F.S.A.

The question certified in the case of State v. Setser is:

"Whether the provisions of Chapter 72-724, Laws of Florida, 1972, prescribing the method and means of determining the penalty to be imposed in a capital case violates the Constitution of the State of Florida and the Constitution of the United States in light of the decision of the United States Supreme Court in the case of Furman v. Georgia, 408 U.S. 238, 32 [33] L.Ed.2d 346, 92 S.Ct. 2726 (1972), and the decision of the Supreme Court of Florida in Donaldson v. Sack, (Florida 1972), 265 So.2d 499."

In the case of State v. Hunter and Moore, the questions certified are:

"1. Whether the new Florida Murder Statute, Ch. 72-724, Laws of Florida (1972) amending Florida Statute sections 782.04 and 921.141, is unconstitutionally vague in violation of the due process and equal protection guaranteed by the Constitutions of the United States and of the State of Florida because a grand jury when called upon to consider bringing an indictment would be unable to distinguish the language between Murder in the First Degree and Murder in the Second Degree.

"2. Whether the new Florida Murder Statute, Ch. 72-724, Laws of Florida (1972), amending Florida Statute sections 782.04 and 921.141, is unconstitutionally vague in violation of the due process and equal protection guaranteed by the Constitutions of the United States and of the State of Florida because a trial judge cannot determine what specific crimes are embodied within the divisions of Murder in the First Degree and Murder in the Second Degree in order to properly instruct a jury and conduct a trial under the requirements set forth by the Supreme Court of Florida in State v. Washington, 268 So.2d 901 (Fla. 1972)."

In the case of State v. Sheppard, the questions certified are:

"Whether the provisions of Florida Statutes 782.04, 775.082 and 921.141 prescribing the penalties for felonies and misdemeanors, the definitions of the degrees of murder and the methods and means of determining the penalty to be imposed upon conviction or adjudication of guilt of a defendant of a capital felony:

"A. Is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States ?

"B. Is an arbitrary infliction of punishment as to deprive the defendant of life, liberty or property without due process of law ?

"C. Is guided by insufficient and arbitrary standards which are vague, indefinite and uncertain as to be contrary to the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Section 12 of the Declaration of Rights of the Constitution of the State of Florida ?

"D. Is vague, ambiguous and indefinite as to deprive the defendant of his right to know the nature of the charges, the differentiation between the degrees of homicide and to be able to prepare a defense accordingly ?

"E. Is placing upon the defendant the burden of proving mitigating circumstances in violation of his right

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against self-incriminating as provided in the Fifth Amendment to the Constitution of the United States?"

The statutes involved in the questions before this Court are Fla.Stat. §§ 775.082, 782.04, and 921.141, F.S.A. Fla.Stat. § 775.082, F.S.A., deals with penalties for criminal convictions and provides, in pertinent part:

"(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in section 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death."

Fla.Stat. § 782.04, F.S.A., the statute under which all the accuseds before this Court are charged, deals with the crime of murder and provides:

"(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when *committed by a person engaged in the perpetration of* or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnaping, aircraft piracy, or unlawful throwing, placing or discharging of a distructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen (17) years when such drug is proven to be the proximate cause of the death of the user shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.

"(b) In all cases under this section the procedure set forth in section 921.141 shall be followed in order to determine sentence of death or life imprisonment.

"(2) When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual or when *committed in the perpetration of* or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnaping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life, or for such term of years as may be determined by the court.

"(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of or in the attempt to perpetrate any felony, other than arson, rape, robbery, burglary, kidnaping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in section 775.082, section 775.083, or section 775.084." (Emphasis supplied)

Fla.Stat. § 921.141, F.S.A., provides the procedure to be followed in determining what penalty should be assessed following a conviction for a crime designated as a capital felony. It provides:

"(1) Upon conviction or adjudication of guilt of a defendant of a capital felony the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury empaneled for

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that purpose unless waived by the defendant. In the proceeding, *evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section.* Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; and further provided that this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

"(2) After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court based upon the following matters:

"(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6), and

"(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh aggravating circumstances found to exist, and

"(c) Based on these considerations whether the defendant should be sentenced to life or death.

"(3) Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

"(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

"(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and based upon the records of the trial and the sentencing proceedings.

"(4) If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

"(5) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Supreme Court.

"(6) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

"(a) The capital felony was committed by a person under sentence of imprisonment;

"(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;

"(c) The defendant knowingly created a great risk of death to many persons;

"(d) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, or kidnaping

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aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;

"(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

"(f) The capital felony was committed for pecuniary gain;

"(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

"(h) The capital felony was especially heinous, atrocious or cruel.

"(7) Mitigating circumstances.—Mitigating circumstances shall be the following:

"(a) The defendant has no significant history of prior criminal activity;

"(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

"(c) The victim was a participant in the defendant's conduct or consented to the act;

"(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

"(e) The defendant acted under extreme duress or under the substantial domination of another person;

"(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

"(g) The age of the defendant at the time of the crime." (Emphasis supplied)

The Supreme Court of the United States in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and subsequent decisions struck down the previously existing death provisions of the several states with the possible exception "of a very few mandatory statutes" (See 408 U.S. 417, n. 2, 92 S.Ct. 2818), by holding:

"[T]he imposition and carrying out of the death penalty *in [these cases]* constitute cruel and unusual punishment in violation *of the Eighth* and Fourteenth Amendments." (Emphasis supplied) (pp. 239–240, 92 S.Ct. p. 2727)

This is the only controlling law which Furman v. Georgia, *supra*, provides, as no more specific statement of the law could garner a majority of the members of the high court. It is not in the province of this Court to attempt to predict the future holdings of the Supreme Court of the United States and to attempt to weigh the laws of the State of Florida in light of the separate opinions of the five justices who constituted the majority in Furman v. Georgia, *supra*.

[1, 2] Two points can, however, be gleaned from a careful reading of the nine separate opinions constituting Furman v. Georgia, *supra*. First, the opinion does not abolish capital punishment, as only two justices—Mr. Justice Brennan and Mr. Justice Marshall—adopted that extreme position. The second point is a corollary to the first, and one easily drawn. The mere presence of discretion in the sentencing procedure cannot render the procedure violative of Furman v. Georgia, *supra*; it was, rather, the quality of discretion and the manner in which it was applied that dictated the rule of law which constitutes Furman v. Georgia, *supra*.

Discretion and judgment are essential to the judicial process, and are present at all stages of its progression—arrest, arraignment, trial, verdict, and onward through final appeal. Even after the final appeal is laid to rest, complete discretion remains in the executive branch of government to honor or reject a plea for clemency. See Fla.Const., art. IV, § 8, F.S.A., and U.S. Const., art. II, § 2.

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Thus, if the judicial discretion possible and necessary under Fla.Stat. § 921.141, F.S.A., can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of Furman v. Georgia, *supra*, has been met. What new test the Supreme Court of the United States might develop at a later date, it is not for this Court to suggest.

As will be discussed hereafter, we have determined that each of the questions certified by the three circuit courts involved in the case *sub judice* must be answered in the negative, and the circuit court in the case of State v. Dixon, case No. 43,521, must be reversed.

[3] Capital punishment is not, *per se*, violative of the Constitution of the United States (Furman v. Georgia, *supra*) or of Florida. Wilson v. State, 225 So.2d 321 (Fla.1969).

Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes. In so doing, the Legislature has also recognized the inability of man to predict the myriad tortuous paths which criminality can choose to follow. If such a prediction could be made, the Legislature could have merely programmed a judicial computer with all of the possible aggravating factors and all of the possible mitigating factors included—with ranges of possible impact of each—and provided for the imposition of death under certain circumstances, and for the imposition of a life sentence under other circumstances. However, such a computer could never be fully programmed for every possible situation, and computer justice is, therefore, an impossibility. The Legislature has, instead, provided a system whereby the possible aggravating and mitigating circumstances are defined, but where the weighing process is left to the carefully scrutinized judgment of jurors and judges.

It is necessary at the outset to bear in mind that all defendants who will face the issue of life imprisonment or death will already have been found guilty of a most serious crime, one which the Legislature has chosen to classify as capital. After his adjudication, this defendant is nevertheless provided with five steps between conviction and imposition of the death penalty—each step providing concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient.

First, the question of punishment is reserved for a post-conviction hearing so that the trial judge and jury can hear other information regarding the defendant and the crime of which he has been convicted before determining whether or not death will be required. Both the State and the defendant are allowed to present evidence at the hearing, evidence which might have been barred or withheld from a trial on the issue of guilt or innocence.

The discretion of the trial judge in determining what evidence might be relevant to the sentence is not unbridled. It is merely a necessary power to avoid a needlessly drawn out proceeding where one party might choose to go forward with evidence which bears no relevance to the issues being considered. It is easily determined from the broadness of the statute that a narrow interpretation of the rules of evidence is not to be enforced, whether in regards to relevance or to any other matter except illegally seized evidence.

Another advantage to the defendant in a post-conviction proceeding, is his right to appear and argue for mitigation. The State can cross-examine the defendant on those matters which the defendant has raised, to get to the truth of the alleged mitigating factors, but cannot go beyond them in an attempt to force the defendant to prove aggravating circumstances for the State. A defendant is protected from self-incrimination through the Constitutions of Florida and of the United States. Fla. Const., art. I, § 9, F.S.A., and U.S.Const., Amend. V. In no event, is the defendant forced to testify. However, if he does, he is protected from cross-examination which seeks to go beyond the subject matter covered on his direct testimony and extend to matters concerning possible aggravating circumstances.

The second step of the sentencing procedure is that the jury—the trial jury if there was one, or a specially called jury if jury trial was waived—must hear the new evidence presented at the post-conviction hearing and make a recommendation as to penalty, that is, life or death. With the issue of guilt or innocence disposed of, the jury can then view the question of penalty as a separate and distinct issue. The fact that the defendant has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation. They must consider from the facts presented to them—facts in addition to those necessary to prove the commission of the crime—whether the crime was accompanied by aggravating circumstances sufficient to require death, or whether there were mitigating circumstances which require a lesser penalty.

The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed—guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.

The fourth step required by Fla.Stat. § 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute.

Review of a sentence of death by this Court, provided by Fla.Stat. § 921.141, F.S.A., is the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes. Surely such a desire cannot create a violation of the Constitution.

We also consider it reasonable to require that a finding that life imprisonment be imposed rather than death should be supported in writing by the trial judge. This we do require under our constitutional power to regulate practice and procedure in the courts. Fla.Const., art. V, § 2(a), F.S.A.

Cases involving life imprisonment would not be directly reviewable by this Court, and the District Courts of Appeal would not be empowered to overturn the trial judge on the issue of sentence. However, requiring these findings by the judge provides an additional safeguard for the defendant sentenced to death in that it provides a standard for life imprisonment against which to measure the standard for death established in the defendant's case, and again avoids the possibility of discriminatory sentences of death.

The most important safeguard presented in Fla.Stat. § 921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed. It is argued that the circumstances are vaguely worded in some cases, and that they do not provide

meaningful restraints and guidelines for the discretion of judge and jury. We disagree.

The aggravating circumstances of Fla. Stat. § 921.141(6), F.S.A., actually define those crimes—when read in conjunction with Fla.Stat. §§ 782.04(1) and 794.01(1), F.S.A.—to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.

Considered in that vein, Fla.Stat. § 921.141(6), subsections (a) and (b), F.S.A., prescribe the death penalty for a capital felony committed by a prisoner or by one previously convicted of a capital felony. These conditions represent two situations wherein the death penalty has been determined by the Legislature to be applicable, absent overriding mitigating factors.

Likewise, Fla.Stat. § 921.141(6)(c), F.S.A., provides the death penalty for one who is convicted of a capital felony in which he knowingly created a great risk of death to many persons. The use of the adjectives "great" and "many" is attacked as vague, but we feel that a man of ordinary intelligence and knowledge easily conceives the concepts involved.

Fla.Stat. § 921.141(6)(d), F.S.A., provides that the commission of a capital felony as part of another dangerous and violent felony constitutes not only a capital felony under Fla.Stat. § 782.04(1), F.S.A., but also an aggravated capital felony. Such a determination is, in the opinion of this Court, reasonable.

Capital felonies committed with the motive of avoiding arrest, escape, monetary gain, or the disruption or hinderance of the lawful exercise of government or law enforcement have also been designated as aggravated capital felonies pursuant to Fla.Stat. § 921.141, F.S.A., subsections (e), (f) and (g), F.S.A., and we again feel that the definitions of the crimes intended to be included are reasonable and easily understood by the average man.

[4-6] The aggravating circumstance which has been most frequently attacked is the provision that commission of an especially heinous, atrocious or cruel capital felony constitutes an aggravated capital felony. Fla.Stat. § 921.141(6)(h), F.S.A. Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla.Stat. § 921.141(7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury.

The first mitigating circumstance is that the defendant has no prior significant history of criminal activity. Fla.Stat. § 921.141(7)(a), F.S.A. As to what is significant criminal activity, an average man can easily look at a defendant's record, weigh traffic offenses on the one hand and armed robberies on the other, and determine which represents significant prior criminal activity. Also, the less criminal activity on the defendant's record, the more consideration should be afforded this mitigating circumstance.

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Extreme mental or emotional disturbance is a second mitigating consideration, pursuant to Fla.Stat. § 921.141(7)(b), F.S.A., which is easily interpreted as less than insanity but more than the emotions of an average man, however inflamed.

If the victim was a participant in or consented to the criminal conduct, or if the defendant was found guilty of a capital felony as an accomplice and did not play any major part in the capital felony, these factors are also to be considered. Fla.Stat. § 921.141(7), subsections (c) and (d), F.S.A.

While duress or domination by another person may not excuse a capital felony, the Legislature has determined that they should be considered in mitigation, not of the guilt of the defendant, but of the sentence. Fla.Stat. § 921.141(7)(e), F.S.A. Such a consideration appears to us to be reasonable, and another protection of the defendant who has at least some basis for seeking the mercy of society.

Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. Fla. Stat. § 921.141(7)(f), F.S.A. Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.

Finally, the age of the defendant may be considered pursuant to Fla.Stat. § 921.141(7)(g), F.S.A. This allows the judge and jury to consider the effect that the inexperience of the defendant on the one hand or, in conjunction with subsection (a), the length of time that the defendant has obeyed the laws in determining whether or not one explosion of total criminality warrants the extinction of life.

Common law recognizes a presumption of the incapacity of an infant to commit a crime, and under the age of seven years, the presumption is conclusive. 43 C.J.S. Infants § 9(1)(d)(1)(b); 6 F.L.P., Criminal Law, § 2b. The possible effect of great age with its attendant weaknesses and infirmities has also been recognized as to the issue of competency, as the Ohio Court of Common Pleas held,

> "[A]ge is an item of proof competent and worthy of being considered in an investigation to determine the question of competency." Corbit v. Corbit, 7 Dec. Repr. 602, p. 607, IV Wkly.Law Bull. 1006 (Ohio Coshocton C.P.1879).

Thus, the Legislature has chosen to provide for consideration of the age of the defendant—whether youthful, middle aged, or aged—in mitigation of the commission of an aggravated capital crime. The meaning of the Legislature is not vague, and we cannot say that such a consideration is unreasonable *per se*. Any inappropriate application by a jury of the standard under the facts of a particular case may be corrected by the Court.

It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia, *supra*, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

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The Circuit Courts of Duval and Orange Counties have also certified questions involving the interpretation of Fla.Stat. § 782.04, F.S.A., insofar as it defines the crimes of murder in the first degree and murder in the second degree. As quoted above, Fla.Stat. § 782.04(2), F.S.A., provides that murder "committed in the perpetration of or in the attempt to perpetrate" any one of seven specified violent felonies is a murder of the second degree. A murder "committed by a person *engaged* in the perpetration of or in the attempt to perpetrate" any of the same violent felonies is a murder in the first degree. Fla.Stat. § 782.04(1)(a), F.S.A.

[7] The trial judge in State v. Dixon held that the distinction between the two sections of the murder statute was illusory, and that one charged with one of the crimes could interchangeably be charged with the other at the whim of the grand jury. We disagree, and hold that the statute does establish two separate and easily distinguishable degrees of crime, depending upon the presence of the defendant as a principal in the first or second degree.

Under the prior Fla.Stat. § 782.04, F.S.A. (amended effective December 8, 1972), the distinction was not present, and Fla.Stat. § 776.011, F.S.A., provides,

> "Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, is a principal in the first degree and may be charged, convicted and punished as such, whether he is or is not actually or constructively present at the commission of such offense."

The effect of this law was that the traditional definitions of principal in the first degree, principal in the second degree, and accessory before the fact were all combined within the statutory definition of principal in the first degree in Fla.Stat. § 776.011, F.S.A., and in the repealed Fla.Stat. § 782.04, F.S.A.

The obvious intention of the Legislature in making this change is to resurrect the distinction between principals in the first or second degree on the one hand and accessories before the fact on the other, in determining whether a party to a violent felony resulting in murder is chargeable with murder in the first degree or murder in the second degree. As to the distinction in any particular case, we need but refer to the rich heritage of case law on the distinctions between principals in the first or second degree and accessories before the fact.

Having reviewed the statutes under consideration, it is the opinion of this Court that Fla.Stat. §§ 775.082, 782.04 and 921.141, F.S.A., are constitutional as measured by the controlling law of this State and under the constitutional test provided by Furman v. Georgia, *supra*.

[8] Accordingly, the certified questions of the Circuit Courts of Duval, Orange and Duval Counties are all answered in the negative, and the decision of the Circuit Court for Dade County in State v. Setser is reversed and the causes are all remanded for further proceedings not inconsistent herewith.

It is so ordered.

CARLTON, C. J., McCAIN and DEKLE, JJ., and WILLIS, Circuit Judge, concur.

ERVIN, J., dissents with opinion.

BOYD, J., dissents with opinion.

ERVIN, Justice (dissenting):

The United States Supreme Court, in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), in striking down as unconstitutional the death penalty statutes of Georgia and Texas held that

> "the imposition and carrying out of the death penalty in [these cases] constitute

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> cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." (Supra at 239-240, 92 S.Ct. at 2727.)

This decision was a 5-4 decision, in which all nine Justices wrote separate opinions. Relying upon *Furman*, the Supreme Court in Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972), unanimously agreed that

> "the Court today has ruled that the imposition of the death penalty under statutes such as those of Illinois is violative of the Eighth and Fourteenth Amendments . . . . " (Supra, at 800, 92 S.Ct. at 2570.)

The *Furman* and *Moore* cases were followed by a series of about 120 unanimous per curiam opinions, in which the Supreme Court invalidated the unexecuted death sentences imposed under the state statutes of 26 states,[1] including Florida's death penalty statute.[2]

This Court has applied *Furman* and the cases which followed it by vacating all unexecuted death sentences which were imposed under the death penalty statute of Florida as it existed at the time of the *Furman* decision.[3]

Under Section 755.082(1), F.S.1971, F.S.A., the death penalty in existence in Florida at the time of the *Furman* decision, any defendant found guilty of a capital felony[4] was sentenced to death unless there was a recommendation of mercy made by the jury in its verdict of guilty.[5] In those cases where the jury recommended mercy, the defendant was sentenced to life imprisonment. Pursuant to Section 4(2), Article V, Florida Constitution 1968, all cases in which the death penalty was imposed were subject to a direct appeal to this Court as a matter of right. This review, however, was limited to the question of guilt or innocence and not the question of punishment. In those cases where the defendant was not sentenced to

1. See Stewart v. Massachusetts, 408 U.S. 845, 92 S.Ct. 2845, 33 L.Ed.2d 744 (1972), and companion cases.

2. § 775.082(1), F.S.1971. Sentences imposed under Florida's death penalty statute were reversed in Anderson v. Florida, 408 U.S. 938, 92 S.Ct. 2868, 33 L.Ed.2d 758 (1972); Thomas v. Florida, 408 U.S. 935, 92 S.Ct. 2855, 33 L.Ed.2d 750 (1972); Johnson v. Florida, 408 U.S. 939, 92 S.Ct. 2875, 33 L.Ed.2d 762 (1972); Boykin v. Florida, 408 U.S. 940, 92 S.Ct. 2876, 33 L.Ed.2d 763 (1972); Brown v. Florida, 408 U.S. 938, 92 S.Ct. 2870, 33 L.Ed.2d 759 (1972); Paramore v. Florida, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972); Pitts v. Wainwright, 408 U.S. 941, 92 S.Ct. 2856, 33 L.Ed.2d 765 (1972), and Williams v. Wainwright, 408 U.S. 941, 92 S.Ct. 2864, 33 L.Ed.2d 765 (1972).

3. *E. g.*, Anderson v. State, 267 So.2d 8 (Fla.1972); In re Baker, 267 So.2d 331 (Fla.1972); Donaldson v. Sack, 265 So.2d 499 (Fla.1972).

4. All felonies were classified as either capital or first, second, or third degree felonies. § 775.081(1), F.S.1971 F.S.A. Capital felonies included: premeditated murder, § 782.04(1), F.S.1971 F.S.A. felony murders, i. e., murders committed in the perpetration of or in the attempt to perpetrate arson, burglary, rape, robbery, abominable and detestable crime against nature, or kidnapping, § 782.041 (1), F.S.1971 F.S.A.; bombing or machine-gunning in public places, § 790.16, F.S.1971 F.S.A.; homicide caused by a destructive device, § 790.161(1), F.S.1971 F.S.A.; rape of a female of the age of ten years or more, § 794.01, F.S.1971, F.S.A., carnal knowledge and abuse of a female child under the age of ten years, § 794.01, F.S.1971, F.S.A., and kidnapping for ransom, § 805.02, F.S.1971, F.S.A.

5. § 775.082(1), F.S.1971, F.S.A., provided: "[a] person who has been convicted of a capital felony shall be punished by death unless the verdict includes a recommendation to [sic] mercy by a majority of the jury, in which case the punishment shall be life imprisonment. A defendant found guilty by the court of a capital felony on a plea of guilty or when a jury is waived shall be sentenced to death or life imprisonment, in the discretion of the court."

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death but to life imprisonment, appellate review was available to the respective District Courts of Appeal.

As a result of the *Furman* line of cases, the Florida Legislature enacted the death penalty statute which is challenged in the cases before us, F.S. Section 921.141, F.S.A. Unlike the old death penalty statute, which gave the jury—or the judge where the defendant pleaded guilty or waived a jury trial—complete and unbridled discretion to decide whether death or life imprisonment would be imposed, the new death penalty statute attempts to limit that discretion in an effort to bring the statute within the requirements of *Furman*. The majority of this Court has held that the Legislature's attempt to re-establish the death penalty has been successful in meeting those requirements. I cannot agree.

Under the new death penalty statute, F. S. Section 921.141, F.S.A. the Legislature has provided for a bifurcated trial system. Under this system a person who is found guilty or pleads guilty to a capital felony[6] receives a second "trial" by the same judge and jury to determine whether the person should be sentenced to death or to life imprisonment. In those cases where the defendant pleads guilty or has waived a jury trial, the statute requires that the trial judge empanel a jury, unless also waived, for the purpose of determining the sentence to impose. Evidence presented at the sentencing hearing is admissible at the discretion of the trial judge.

The jury's function is to make a recommendation at the conclusion of the second hearing as to whether the defendant should be sentenced to death or to life imprisonment. The recommendation, however, is advisory only, in that the trial judge is not in any way bound by their recommendation. The trial judge, based upon his own evaluation of the evidence, makes the actual determination of what sentence to impose.

In those cases where the defendant is sentenced to death, the trial judge is required to set forth in writing his findings upon which the sentence is based. No similar requirement, however, is provided for in those cases where the trial judge imposes life imprisonment. If the death penalty is imposed, the decision is subject to review by this Court upon both the question of guilt or innocence and the question of the sentence. In those cases where life imprisonment is imposed, appellate review exists in the District Courts of Appeal.

Finally, the Legislature has provided a list of eight aggravating circumstances and seven mitigating circumstances which the jury and the trial judge are to consider in their determination of what sentence to impose.

While the total impact of the *Furman* decision is not known because of the nine separate opinions of the United States Supreme Court, one principle seems clear: the discretionary system under which the death penalty has been imposed by the several states is violative of the Eight and Fourteenth amendments. The questions of whether the death penalty is, per se, unconstitutional and whether all discretionary death penalty statutes are unconstitutional were not sufficiently answered by the U.S. Supreme Court. Nor do I find it necessary to reach those questions at this time. All that is necessary for this Court to decide is the question of whether or not the system provided for in F.S. Section 921.-141, F.S.A. sufficiently eliminates the discretion which the U.S. Supreme Court in *Furman* condemned. It is significant to note, however, that several authorities have interpreted *Furman* to hold that no death penalty statute which contains any discretion whatsoever is constitutional. Thus, the Attorney General of Florida in a memorandum dated July 7, 1972, analyzed *Furman* and concluded

> "it is my view that the United States Supreme Court's decision has not impaired and does *not* prevent the enactment of legislation calling for the death penalty *so long as said legislation is mandatory in its terms.* Such legislation would present an entirely different legal question that that disposed of by the Court.[7] (Emphasis supplied.)

Also, two Assistant Attorneys General, Mr. Georgieff and Mr. Markey, testifying before the House Select Committee on the Death Penalty on November 27, 1972, stated that any effort to reinstate the death penalty on a discretionary basis would be unconstitutional under *Furman*.[8] The legal advisory staff of the Governor's Committee to Study Capital Punishment, on October 20, 1972, reached a similar conclusion.[9] Finally, the Maryland Court of Appeals, in Batholomey v. State, 267 Md. 175, 297 A.2d 696 (1972), states:

> "we entertain not the slightest doubt that the imposition of the death sentence under any of the presently existing discretionary statutes of Maryland which authorize, but do not require, that penalty is unconstitutional under *Furman* as violative of the Eighth and Fourteenth Amendments to the federal constitution. In other words, we think the net result of the holding in *Furman* is that the death penalty is unconstitutional when its imposition is not mandatory." (297 A.2d at 701; footnotes omitted.)

Without deciding whether any one element of discretion in this statute is violative of the Eighth and Fourteenth amendments, I conclude that the cumulative effect of this statute is to allow essentially the same excessive discretionary system which the U. S. Supreme Court would not allow in the *Furman* line of cases.

Turning to the statute itself, the majority finds the addition of a bifurcated trial system to be one of five steps between conviction and the imposition of the death penalty which provide adequate safeguards to protect a convicted defendant from the imposition of the death penalty where a less harsh punishment might be sufficient. The majority, however, fails to recognize that similar bifurcated trial systems were provided for in statutes held unconstitutional as a result of *Furman*. Bifurcated trials were provided for by the laws of California,[10] Connecticut,[11] Georgia,[12] New York,[13] Pennsylvania,[14] and Texas.[15] Of greater significance is the fact that at the penalty proceeding evidence upon any matter the trial judge deems "relevant" to the sentencing decision and of "probative value" may be admitted.[16] This, of course, constitutes a part of the discretion still remaining in the statute—which the majority recognizes.

The statute also provides for the weighing of evidence, in addition to that admitted into the trial on the question of guilt

6. Capital felonies are now defined by F.S. § 782.04, F.S.A.

7. Memorandum, Attorney General of Florida 7 (July 7, 1972).

8. Hearings, House Select Committee on the Death Penalty, November 27, 1972.

9. Memorandum, Legal Advisory Staff, Governor's Committee to Study Capital Punishment 9 (October 20, 1972).

10. Cal.Penal Code § 190.1 (1970).

11. Conn.Gen.Stat.Rev. § 53a-46 (Supp. 1969).

12. Act of March 27, 1970, No. 1333, Ga. Laws 1970, p. 949.

13. N.Y.Penal Law, McKinney's Consol. Laws, c. 40, § 125.30 (Supp.1970-71), § 125.35 (1967).

14. Pa.Stat.Ann., Tit. 18, § 4701 (1963).

15. Tex.Code Crim.Proc., Art. 37.07(2)(b) (Supp.1970-1971).

16. New York law provided in similar manner that
> "evidence may be presented by either party on any matter relevant to sentence . . . . . Any relevant evidence, not legally privileged, shall be received regardless of its admissibility under the exclusionary rules of evidence." N.Y.Penal Law § 125.35(3) (1967).

or innocence, by the jury, upon which a recommendation as to what sentence is to be imposed is based; the majority's second step. Following this recommendation, the statute provides that the trial judge make the actual determination of the sentence to be imposed; the majority's third step.

Like the provision for a bifurcated trial system, some of the cases in which the United States Supreme Court reversed the imposition of the death penalty involved states whose laws provided the trial judge with the power to override a jury recommendation of life imprisonment or death.[17]

More importantly, too much discretion still remains in the jury in deciding what recommendation to make and in the trial judge in deciding what sentence to impose. The only attempt to eliminate that discretion is the addition of the lists of aggravating and mitigating circumstances. In making their decisions, both the trial judge and the jury are required to base their decisions upon

"(a) Whether *sufficient* aggravating circumstances exist . . . and

"(b) Whether *sufficient* mitigating circumstances exist . . . which outweigh aggravating circumstances found to exist . . ." (Emphasis supplied.)[18]

According to the majority, the existence of the aggravating and mitigating circumstances is the "most important safeguard presented in Fla.Stat. § 921.141. . . ." The majority, however, fail to recognize that weighing of aggravating and mitigating circumstances, or some similar provision, was required by several of the states, either by statute or case law, whose death penalty statutes were found to be unconstitutional as a result of *Furman*. Some of the circumstances considered were also similar to those provided in the Florida death penalty statute.

For example, Connecticut law provided for a separate hearing upon the question of sentence at which time "evidence may be presented . . . including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravation or mitigation of the penalty."[19]

Illinois law provided that a defendant "was entitled to have his punishment determined upon evidence limited to the facts and circumstances of that crime,"[20] and it was "the duty of the jury to fix the penalty from a consideration of all the circumstances, including the heinousness, atrocity, and cruelty of the crime. . . ."[21]

In People v. Grews, 42 Ill.2d 60, 244 N.E.2d 593 (1969), the Illinois Court reversed the imposition of the death penalty based upon the fact that the defendant had no prior criminal record, was well regarded by friends, and was acting under the influ-

17. In the following cases the jury could make a binding recommendation of mercy, but a recommendation of death could be overridden by the trial judge: Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972); Harst v. Illinois, 408 U.S. 935, 92 S.Ct. 2854, 33 L.Ed.2d 749 (1972); Arrington v. Maryland, 408 U.S. 938, 92 S.Ct. 2869, 33 L.Ed.2d 759 (1972); Bartholomey v. Maryland, 408 U.S. 938, 92 S.Ct. 2870, 33 L.Ed.2d 770 (1972); Strong v. Maryland, 408 U.S. 939, 92 S.Ct. 2872, 33 L.Ed.2d 769 (1972), and Toll v. Warden, 408 U.S. 939, 92 S.Ct. 2871, 33 L.Ed.2d 769 (1972).

In the following cases the jury was authorized to make a binding recommendation of death, but a recommendation of mercy could be overridden by the trial judge: Kelbach v. Utah, 408 U.S. 935, 92 S.Ct. 2858, 33 L.Ed.2d 751 (1972); Seeney v. Delaware, 408 U.S. 939, 92 S.Ct. 2871, 33 L.Ed.2d 769 (1972), and Steigler v. Delaware, 408 U.S. 939, 92 S.Ct. 2872, 33 L.Ed.2d 769 (1972).

18. § 921.141(2)(a), (b), F.S.A. Also see § 921.141(3), F.S.A.

19. Conn.Gen.Stat.Rev. § 53a-46(a) (Supp. 1969).

20. People v. Black, 367 Ill. 200, 10 N.E.2d 801, 804 (1937).

21. People v. Sullivan, 345 Ill. 87, 177 N.E. 733, 736 (1931).

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ence of drugs. In People v. Walcher, 42 Ill.2d 139, 246 N.E.2d 256 (1969), the imposition of the death penalty was reversed because the defendant was an alcoholic.

Juries in Nebraska, in making their decisions as to whether defendants should be sentenced to death "had no right to be actuated by considerations of mercy but should be guided alone by the evidence, the facts, and the circumstances disclosed by the record. . . ."[22] In State v. Hall, 176 Neb. 295, 125 N.W.2d 918 (1964), a sentence of death was reversed because the defendant was young, feeble-minded and had no previous criminal record.

In Oklahoma, imposition of the death penalty has been reversed because the defendant's participation in felony murder was that of a minor accomplice;[23] because the defendant was intoxicated at the time, had no criminal record, and had a limited education;[24] and on the grounds that the defendant did not have a bad record after return from the army, and the victim was engaged in illegal activity when killed.[25]

In Pennsylvania, the imposition of the death penalty has been reversed where the defendant was young and of low intelligence;[26] where the defendant was devoted to his mother, had a good reputation, and was in a desperate financial situation and was poorly educated,[27] and where the defendant was of good character, without criminal record and there was provocation present.[28]

New Jersey law required that when life imprisonment was recommended the recommendation had to be made "upon and after the consideration of all the evidence."[29] This evidence included evidence relative to the background and the mental and emotional abilities and disabilities of defendants.[30]

Under Ohio law, a decision to recommend mercy had to be based upon "the facts and circumstances described by the evidence."[31]

Finally, under Tennessee law, the penalty for murder was death but it was provided that "the jury may, if they are of opinion that there are mitigating circumstances, fix the punishment at . . ." from twenty years to life imprisonment.[32]

The difficulty with such general provisions was recognized in McGautha v. California, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971). In *McGautha*, Mr. Justice Harlan, speaking for the majority, states:

"It is apparent that such criteria do not purport to provide more than the most minimal control over the sentencing authority's exercise of discretion. They do not purport to give an exhaustive list of the relevant considerations or the way in which they may be affected by the presence or absence of other circumstances. They do not even undertake to exclude constitutionally impermissible considerations. And, of course, they provide no protection against the jury determined to decide on whimsy or caprice. In short, they do no more than suggest some subjects for the jury to consider during its

22. Sundahl v. State, 154 Neb. 550, 48 N.W.2d 689, 704 (1951).

23. Lewis v. State, 451 P.2d 399 (Okl.Cr. App.1968).

24. Williams v. State, 89 Okl.Cr. 95, 205 P.2d 524 (1949).

25. Waters v. State, 87 Okl.Cr. 226, 197 P.2d 299 (1948).

26. Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959).

27. Commonwealth v. Irelan, 341 Pa. 43, 17 A.2d 897 (1941).

28. Commonwealth v. Garramone, 307 Pa. 507, 161 A. 733 (1932).

29. N.J.Stat.Ann., § 2A:113-4 (1969).

30. State v. Reynolds, 41 N.J. 163, 195 A.2d 449 (1963).

31. State v. Tudor, 154 Ohio St. 249, 95 N.E.2d 385, 390 (1950).

32. Tenn.Code Ann., § 39-2406 (1955).

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deliberations, and they bear witness to the intractable nature of the problem of 'standards' which the history of capital punishment has from the beginning reflected." [33]

Under the Florida death penalty statute the lists of aggravating and mitigating circumstances are provided as the only circumstances which the trial judge and the jury are to consider in making their decisions. The limited nature of the lists provided by the Legislature was, however, also criticized by the U. S. Supreme Court in *McGautha*. On this point, Mr. Justice Harlan states that

> "for a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless 'boilerplate' or a statement of the obvious that no jury would need.[34]

Mr. Chief Justice Burger in his dissenting opinion in *Furman* further points out that

> "all past efforts 'to identify before the fact' the cases in which the penalty is to be imposed have been 'uniformly unsuccessful' . . . . One problem is that 'the factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula . . .' Report of the Royal Commission on Capital Punishment, 1949–1953, Cmd. 8932, ¶ 408 [p. 174] (1953). As the Court stated in McGautha, '[t]he infinite variety of cases and facets to each case would make general standards either meaningless "boiler-plate" or a statement of the obvious that no jury would need.' 402 U. S., at 208, 91 S.Ct., at 1968 [, 28 L.Ed.2d at 727]. . . . Thus, unless the Court in *McGautha* misjudged the experience of history, there is little reason to believe that sentencing standards in any form will substantially alter the discretionary character of the prevailing system of sentencing in capital cases." [35]

Thus, by limiting the circumstances which the trial judge and the jury must consider, a new problem arises: the impossibility of listing all of the aggravating and mitigating circumstances which should be considered in deciding whether or not to impose the death penalty.

Additionally, the determination of what constitutes *sufficient* aggravating circumstances or *sufficient* mitigating circumstances and which set of *sufficient* circumstances outweighs the other is left to the sole discretion of jury, trial judge, and appellate reviewer. Other than the requirement that the circumstances be sufficient, no guidelines are provided by the statute. Thus both the trial judge and the jury are left with the discretion to determine what weight is to be given to each individual aggravating and mitigating circumstance. The presence or absence of any such circumstance or combination thereof does not compel any particular result. Whether a particular aggravating circumstance or circumstances will outweigh a particular mitigating circumstance or circumstances is solely within the discretion of the trial judge and jury. Additionally, the statute does not provide what burden of proof is required; beyond a reasonable doubt or some other test.

Another problem exists which compounds the excessive discretion which exists in deciding what weight is to be given the aggravating and mitigating circumstances: the exercise of discretion necessary in interpreting these vague and overbroad circumstances.

33. McGautha v. California, 402 U.S. 183, 207, 91 S.Ct. 1454, 1467, 28 L.Ed.2d 711, 726 (1971).

34. Id. 402 U.S. at 208, 91 S.Ct. at 1467–1468, 28 L.Ed.2d at 727.

35. Furman v. Georgia, 408 U.S. 238, 401, 92 S.Ct. 2726, 2809–2810, 33 L.Ed.2d 346, 442–443 (1972) (Burger, C. J., dissenting.)

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Defendants "under sentence of imprisonment" [36] include all persons charged with crimes, whether a violent crime or not, as well as all degrees of crimes which might be considered violent. In determining whether a convicted capital felon has "knowingly created a great risk of death to many persons" [37] discretion is allowed, in fact required, to determine what constitutes "great risk" and what constitutes "many persons." The most difficult aggravating circumstance to justify is where the crime is found to be "especially heinous, atrocious or cruel." [38] Even the majority unintentionally recognize the vagueness of this provision by their statement that "to a layman, no capital crime might appear to be less than heinous. . . ."

The mitigating circumstances require the same degree of discretion in interpreting them. What constitutes "no significant history of prior criminal activity" ? [39] What interpretation is to be given to "the influence of extreme mental or emotional disturbance" ? [40] Also included are tests such as "capacity . . . substantially impaired" ; [41] the influence of "extreme duress or . . . substantial domination of another" ; [42] participation as "an accomplice . . . relatively minor," [43] and the "age of the defendant." [44]

Virtually all of the aggravating and mitigating circumstances thus require in themselves the application of judicial discretion in interpreting these circumstances in each individual case. Although the trial judge makes the actual determination of the sentence to impose, he must exercise the same degree of discretion as the jury. The fact that both judge and jury make a determination is of little consequence, for the statute in no way provides what weight, if any, the trial judge must give to the jury's recommendation.

The majority's fourth step—the requirement that the trial judge justify a sentence of death in writing—and the majority's fifth step—appellate review—do not sufficiently eliminate the excessive discretion required by the statute.

Appellate review of the issue of punishment was provided for by several statutes which were found to be unconstitutional as a result of *Furman*. [45] Additionally, the statute does not provide any guides for this Court as to our function upon review. For instance, what weight, if any, is this Court to give to a jury recommendation where the trial judge has not followed that recommendation?

The statute also fails to require either written findings or immediate review by this Court where life imprisonment, rather than the death penalty, is imposed by the trial judge. Thus "no meaningful basis for distinguishing the few cases in which it [the death penalty] is imposed from the many cases in which it is not." [46] is provided for.

36. § 921.141(6)(a), F.S.A.

37. § 921.141(6)(c), F.S.A.

38. § 921.141(6)(h), F.S.A.

39. § 921.141(7)(a), F.S.A.

40. § 921.141(7)(b), F.S.A.

41. § 921.141(7)(f), F.S.A.

42. § 921.141(7)(e), F.S.A.

43. § 921.141(7)(d), F.S.A.

44. § 921.141(7)(g), F.S.A.

45. The United States Supreme Court reversed death sentences in several states in which the state appellate courts had exercised their powers to review a sentence of death. *See, e. g.*, Alford v. Eyman, 408 U.S. 929, 92 S.Ct. 2874, 33 L.Ed.2d 762 (1972), which reversed State v. Alford, 98 Ariz. 124, 402 P.2d 551 (1965).

46. Furman v. Georgia, 408 U.S. 238, 313, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346, 392 (1972) (White, J., concurring).

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Finally, in addition to the discretion required by F.S. Section 921.141, F.S.A., there exists in our judicial system a degree of discretion at every stage of a criminal proceeding. Mr. Chief Justice Burger recognizes at least one aspect of our judicial system in which the possibility of the exercise of excessive discretion exists when he states,

> "there is no assurance that sentencing patterns will change so long as juries are possessed of the power to determine the sentence or to bring in a verdict of guilt on a charge carrying a lesser sentence; juries have not been inhibited in the exercise of these powers in the past." [47]

Although not in itself determinative of this case, this discretion adds to that discretion required in the application of the new death penalty statute. The majority recognizes this fact by its statement that

> "discretion and judgment are essential to the judicial process, and are present at all stages of its progression—arrest, arraignment, trial, verdict, and onward through final appeal. Even after the final appeal is laid to rest, complete discretion remains in the executive branch of government to honor or reject a plea for clemency."

Some of the areas where discretion must be exercised include: (1) the inevitable discretion in making factual determinations; (2) the decision of the grand jury; (3) the decision of the prosecutor to bring charges, what charges to bring, and what penalty to ask for; (4) the jury's decision to convict of a lesser included offense; and (5) executive clemency.

In addition to the concern over the existence of excessive discretion, the United States Supreme Court was bothered by the manner in which the death penalty had been applied. Mr. Justice Stewart stated:

> "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race." [48]

Mr. Justice Marshall states:

> "Regarding discrimination, it has been said that '[i]t is usually the poor, the illiterate, the underprivileged, the member of the minority group—the man who, because he is without means, and is defended by a court appointed attorney—who becomes society's sacrificial lamb . . . .' Indeed, a look at the bare statistics regarding executions is enough to betray much of the discrimination. . . . It is immediately apparent that Negroes were executed far more often than Whites in proportion to their percentage of the population. . . .
>
> "There is also overwhelming evidence that the death penalty is employed against men and not women. . . .
>
> "It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society." [49]

Mr. Justice Stewart concludes that it has not been proved that the few defendants

47. *Id.*, 408 U.S. at 401, 92 S.Ct. at 2810, 33 L.Ed.2d at 443 (Burger, C. J., dissenting).

48. *Id.*, 408 U.S. at 309-310, 92 S.Ct. at 2762, 33 L.Ed.2d at 350 (1970) (Stewart, J., concurring).

49. *Id.*, 408 U.S. at 364-365, 92 S.Ct. at 2790-2791, 33 L.Ed.2d at 421-422 (Marshall, J., concurring).

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who have been sentenced to die have been selected on the basis of race and thus fails to reach the question of whether the application of the death penalty constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment.

The comments quoted above raise, generally, a second issue which I feel compelled to discuss: Whether the classification selected by the Legislature of Florida of those individuals subject to capital punishment denies to any person within the State of Florida the equal protection of the laws. In discussing this issue, it is necessary to first decide what test is to be applied in determining whether the equal protection's prohibition against unreasonable classifications has been violated.

That laws are all to some degree or another based upon some form of classification is clear. Such classifications are not per se violative of equal protection. But it is also clear that any disparity in treatment of individuals caused by such a classification must be at least *reasonable*.[50] Traditionally, the test of whether a classification is reasonable includes a determination of whether the classification is in itself a rational one, i. e., based upon social, economic, historical or geographic sectors, whether the classification and the legislative purpose are reasonably related, and whether all those included in the classification are treated equally—in light of the above-quoted portions of *Furman* it is doubtful whether the death penalty statutes which were struck down by *Furman* could meet this latter portion of the reasonableness test.

A stricter requirement has been employed where a classification is based upon a "suspect criteria" or where the classification restricts a "fundamental right." In cases involving such classifications, in addition to requiring that the traditional test of reasonableness be met, the states have been required to prove that a "compelling state interest" is served by the classification.

In my opinion, the selection of capital felons as a class upon whom the death penalty may be imposed clearly involves the "fundamental rights" of citizens of this state and is thus a suspect classification for which a compelling state interest must be shown. Additionally, as Mr. Justice Stewart and Mr. Justice Marshall recognize, the classification may be based, at least in its practical effects, upon race, thus requiring the application of the same test. Because this has not been proved, however, I do not feel it appropriate to hold that the application vel non of Florida's death penalty statute is (or will be) applied on the basis of race. That fundamental rights are involved, however, seems clear and each case where the death penalty has been imposed must be judicially tested to determine if an invidious racial element entered into the imposition.

Mr. Justice Brennan, in concluding that the death penalty is per se unconstitutional, recognizes what can hardly be denied—that the imposition of death deprives a human being of all rights. In discussing the question of whether death is uniquely degrading to human dignity, Mr. Justice Brennan states as follows:

> "Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose 'the right to have rights.' A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a 'person' for purposes of due process of law and the equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right

50. See Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

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of access to the courts. His punishment is not irrevocable. . . . An executed person has indeed 'lost the right to have rights.'" [51]

It is abundantly clear that the imposition of death deprives all persons subjected to such a punishment of all fundamental rights. It also, and possibly of greater significance, deprives those punished by death of life itself.

Turning to the reasoning behind death penalty statutes, Mr. Justice Marshall concludes that there are six purposes conceivably served by capital punishment:

"retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy." [52]

While traditionally these purposes have been accepted as justifying the imposition of the death penalty, nevertheless in the light of these sober and thought-provoking reflections of members of the nation's highest court, I can no longer blindly accept their accuracy. As Mr. Justice Brennan points out,

"the outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it. The evidence is conclusive that death is not the ordinary punishment for any crime." [53]

Mr. Justice Stewart states,

"it is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare." [54]

Mr. Justice White concludes that

"the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system." [55]

Because of the infrequent use of the death penalty, it would seem reasonable, in fact mandatory, that the Florida Legislature reconsider the purposes which have traditionally been assumed to justify so harsh a penalty as death. The Legislature, in re-enacting a death penalty statute, placed its emphasis on merely meeting the requirements of *Furman*. What the Legislature failed to do was to determine whether or not the purposes which have traditionally been assumed to support the imposition of the death penalty remain viable today. Florida's history alone of refusing for the past several years to impose the death penalty should not have been lightly disregarded by the Legislature.

Mr. Justice Marshall has concluded that the traditional purposes of the death penalty do not retain their validity. I am not able at this time to reach the same conclusion, for neither the Legislature in enacting this statute nor the Florida Attorney General in arguing the case, have addressed themselves to this point. It is my conclusion, however, that the State has failed to present sufficient proof upon which it may be concluded that the death penalty is supported by any compelling state interest.

Florida's citizens should not be subjected to a state law imposing the death penalty of greater degree and kind than that which

51. Furman v. Georgia, 408 U.S. 238, 290, 92 S.Ct. 2726, 2752-2753, 33 L.Ed.2d 346, 378-379 (1972) (Brennan, J., concurring).

52. *Id.* 408 U.S. at 342, 92 S.Ct. at 2779, 33 L.Ed.2d at 405 (Marshall, J., concurring).

53. *Id.* 408 U.S. at 291, 92 S.Ct. at 2753, 33 L.Ed.2d at 379 (Brennan, J., concurring).

54. *Id.* 408 U.S. at 309, 92 S.Ct. at 2762, 33 L.Ed.2d at 390 (Stewart, J., concurring).

55. *Id.* 408 U.S. at 311, 92 S.Ct. at 2763, 33 L.Ed.2d at 391 (White, J., concurring).

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may be constitutionally imposed upon other citizens of the nation. Life is such a supremely precious privileged right to have, enjoy and exercise that the Constitution of the United States protects it equally for all the nation's citizens from state governmental deprivations of different kinds and degrees.

Unless Florida's death penalty statute can meet national standards it must fall because of sheer inequality. One state can not have a greater compelling interest in imposing the death penalty than another; nor can its death penalty statute differ in constitutional substance from that of another state.

It is our duty as judges sworn to uphold the nation's constitution to apply national constitutional standards with clinical objectivity in this matter, without catering to popular clamor or the vagaries of provincialism, local pressures, emotion or passion.

Quite candidly and with respect, our Florida Legislature appears from its statutory product to have impulsively and emotionally due to public clamor strayed from the national standards set forth in the plural-opinion decision of the United States Supreme Court in *Furman*. Sober reflection should have its second inning in our State Legislature.

It is my hope that there may be a second inning and, if so, that the Legislature will reconsider this profound subject less precipitately and passionately than it did—less under the influence of archaic and atavistic impulses and the whip of public furor stirred by national and local political opportunism. The grave problem of whether the death penalty should be imposed ought not to be a vehicle for political capital or to serve as an extraneous scapegoat to illogically appease our society's sense of guilt, fear, passion, and vengeance. All of us have feet of clay, none of us has all-knowing impeccable judgment; none of us can be exemplars of "holier than thou" in this matter of governmentally prescribing life or death for other citizens. The greatest care to follow national standards should be taken by the Legislature in making a collective judgment regarding capital punishment.

In our pecuniary culture the rage to emulate status by invidious comparison on bases of wealth or one's cunning ability to get more and spend more than his neighbors, causes us to constantly downgrade or become callous to the value of humanitarian principles.

The death penalty, to conventional nonthinkers despite conclusions to the contrary of the Supreme Court of the United States, is a protective deterrent essential to class status because capital felonies are often committed by the "have nots" and the economically inferior. They overlook that the hallmark of a civilized progressive people is their appreciation that infliction of cruel and unusual punishment disproportionately upon the underprivileged and the mentally incompetent is the antithesis of a fair and humane society and can be one of the elements leading to anarchy and revolution. Because of pecuniary myopia, we often narrow our horizons of compassion and insularly lack reverence f

Because of our overdrawn servility to the concepts of economic status and our personal standings in those respects, we are inclined to be callous to the virtues of compassion and refuse to take slower paces for the correction of human ills through education and rehabilitation. These more enlightened alternatives are not harsh or speedy enough to suit our atavistic sense of vengeance or our passions, or to calm our imagined fears of threats to our pecuniary society or to abate our belief that extreme deterrents are necessary.

We often avoid the psychological and scientific methods of coping with society's ills—the slower, painstaking rehabilitative measures requisite to the evolution of a peaceful, enlightened society. We seek emotional shortcuts to assuage our fears. Like vigilantes, our humanity and sense of ultimate values are weak. Our Legislature

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should have opportunity again to take these enlightened alternatives more into account in faithfully complying with national standards.

Despite the terror and horribleness of heinous homicidal crime, each instance of which outrages our sensibilities, the need for mature intelligence and understanding in devising therefor the State's corrective and rehabilitative processes is nevertheless mandatory in the light of the pronouncements of the Supreme Court of the United States.

The nation's highest court recognizes we have come a long way from the rack, the "drawing and quartering," the headsman's axe, the public executions, the "hanging judge"—from cruel and unusual punishments. We can little afford to turn back because it is clear to thinking people that brutality and cruelty at the hands of government soils the fabric of an enlightened nation. Governments are constantly under scrutiny—constantly gauged by a nation's thinking people in terms of whether they are enlightened and humane; of whether they are still instruments of oppression, perpetuators of archaic punishments to allay the fears and passions of privileged groups.

Sir Winston Churchill wisely said in the House of Commons in 1910:

> "The word and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of any country.
>
> "A calm, dispassionate recognition of the rights of the accused, and even of the convicted criminal, against the state; a constant heart-searching by all charged with the duty of punishment; a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment, tireless efforts toward the discovery of curative and regenerative processes; unfailing faith that there is a treasure if you can only find it, in the heart of every man—these are the symbols which in the treatment of crime and criminal mark and measure the shored up strength of a nation, and are sign and proof of the living virtue within it."

It is therefore my conclusion that Section 921.141, Florida Statutes, F.S.A., is unconstitutional because: (1) the statute does not sufficiently eliminate the discretion in imposing the death penalty which *Furman* condemns; (2) the State has failed to consider or present sufficient proof upon which it may be concluded that the death penalty for a citizen of the United States is justified by a compelling state interest; (3) Florida must comply with national standards as enunciated by the Supreme Court of the United States in imposing a state death penalty; (4) Florida should not apply a death penalty of greater degree and kind to its citizens than do other states—perhaps Florida should await action of the Congress in prescribing the death penalty, if any, according to national standards enunciated by the United States Supreme Court because of the Federal citizenship of the nation's citizens, including Floridians.

BOYD, Justice (dissenting).

I respectfully dissent.

The Supremacy Clause of the Constitution of the United States provides that document is the Supreme Law of the Land.[1] Upon the State courts, equally with the courts of the Federal system, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States whenever those rights are involved in any suit or proceedings before them.[2] Consequently, it is the duty of State Supreme Courts to follow the guidelines announced by the Supreme Court of the United States in construing Federal Constitutional rights.

1. U.S.Const. Art. VI, cl. 2. provides: "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

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From the time Florida became a part of the United States of America, up until 1972, capital punishment had been held to be constitutional by both the courts of the United States and of the State of Florida. However, in Furman v. Georgia,[3] and several companion decisions, a majority of the Supreme Court of the United States held capital punishment, as it had been administered in this country, to be unconstitutional. While four members of the Court held the capital punishment laws constitutional, two members clearly indicated that they felt all forms of capital punishment laws violated the Eighth and Fourteenth Amendments to the Constitution of the United States, and the remaining three members of the Court ruled against any capital punishment in which the court or jury had discretion in fixing sentences, as had been the case in most states up to that time.

Although it seems impossible to arrive at any central theme of the Court, nevertheless, by reading the nine separate opinions contained in *Furman*, it seems probable that at least one of those rejecting capital punishment in that decision might well join the four dissenters and form a majority approving capital punishment if the exercise of discretion by judges and juries should be eliminated, since, in *Furman*, several of the "majority" justices indicated that the only acceptable basis for capital punishment would be a system under which all persons found guilty of certain crimes would be executed without regard to "mitigating" or "aggravating" circumstances.

Assuming, *arguendo*, that the Supreme Court of the United States might approve a capital punishment statute under which no discretion would be exercised, let us now weigh Florida's new capital punishment statute against that concept to see whether said statute meets Federal Constitutional standards.

Under the prior law,[4] when a trial jury found a person guilty of a capital felony, a majority of the twelve member jury could mandate a life sentence for the defendant, instead of death, by recommending him to the mercy of the court. The judge would then be compelled by statute to impose a life sentence. Alternatively, if no such recommendation was given, the judge was similarly compelled to impose a death sentence. It was this type of discretion exercised by juries under the prior law which was so strongly condemned by the Court in *Furman*.

2. Irvin v. Dowd, 359 U.S. 394, 79 S.Ct. 825, 3 L.Ed.2d 900 (1959); Smith v. O'Grady, 312 U.S. 329, 61 S.Ct. 572, 85 L.Ed. 859 (1941); United States v. Bank of New York and Trust Company, 296 U.S. 463, 56 S.Ct. 343, 80 L.Ed. 331 (1936); Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935).

3. 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

4. Section 921.141, Florida Statutes 1971, F.S.A., which provided: "A defendant found guilty by a jury of an offense punishable by death shall be sentenced to death unless the verdict includes a recommendation to mercy by [a majority of] the jury. When the verdict includes a recommendation to mercy by [a majority of] the jury, the court *shall* sentence the defendant to life imprisonment. A defendant found guilty by the court of an offense punishable by death [on a plea of guilty or] when a jury is waived shall be sentenced by the court to death or life imprisonment." (Emphasis supplied.)

Of course, according to its normal usage, the word "shall" in a statute has a mandatory connotation. *See* City of Orlando v. County of Orange, 276 So.2d 41, 43, n. 4 (Fla.1973), *citing* Neal v. Bryant, 149 So.2d 329 (Fla.1962).

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The new law[5] provides, generally, for a jury first to determine guilt or innocence, and then for that same jury to consider circumstances, relating both to the defendant and the crime, upon which to base a recommendation for the imposition of death or a life sentence. Regardless of the jury's recommendation, however, the judge may, in his discretion, impose a sentence of death or life. In point of fact, a death sentence could be imposed although the entire twelve member jury had recommended a life sentence. Likewise, the judge could impose a life sentence although the entire jury had recommended death.

Under the old system, a majority of the twelve member jury, in the exercise of their discretion, determined the nature of the punishment. Under the new law, to the exercise of that discretion is added the opportunity for the arbitrary, completely unfettered, and final exercise of discretion

5. Section 921.141, Florida Statutes, as amended by Chapter 72-724, Laws of Florida, which provides:

"(1) Upon conviction or adjudication of guilt of a defendant of a capital felony the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury empaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; and further provided that this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

"(2) After hearing all the evidence, the jury shall deliberate and render an *advisory sentence* to the court based upon the following matters:

"(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6), and

"(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh aggravating circumstances found to exist, and

"(c) Based on these considerations whether the defendant should be sentenced to life or death.

"(3) *Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravation and mitigating circumstances shall enter a sentence of life imprisonment or death*, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

"(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

"(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and based upon the records of the trial and the sentencing proceedings.

"(4) If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

"(5) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Supreme Court.

"(6) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

"(a) The capital felony was committed by a person under sentence of imprisonment;

"(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;

"(c) The defendant knowingly created a great risk of death to many persons;

"(d) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnaping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;

"(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

"(f) The capital felony was committed for pecuniary gain;

"(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

"(h) The capital felony was especially heinous, atrocious or cruel.

"(7) Mitigating circumstances.—Mitigating circumstances shall be the following:

"(a) The defendant has no significant history of prior criminal activity;

"(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

"(c) The victim was a participant in the defendant's conduct or consented to the act;

"(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

"(e) The defendant acted under extreme duress or under the substantial domination of another person;

"(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

"(g) The age of the defendant at the time of the crime."

(Emphasis supplied).

6. *Compare* Section 782.04(1)(a), Florida Statutes, as amended by Chapter 72-724, Laws of Florida:

The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnaping, aircraft piracy, or unlawfully throwing, placing or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen (17) years when such drug is proven to be the proximate cause of the death of the user *shall be murder in the first degree* and shall constitute a capital felony, punishable as provided in [illegible]." (Emphasis supplied.)

with Section 782.04(2), Florida Statutes, as amended by Chapter 72-724, Laws of Florida:

When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual or *when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, kidnaping, aircraft piracy, placing or discharging of a destructive device or bomb* as provided in subsection (1) *hereof in the second degree* shall constitute a felony of the [illegible] punishable by imprisonment in the state prison for life, or for such term of years as may be determined by the court." (Emphasis supplied.)

nies may be guilty of first degree murder, while, in another trial, one who causes death to another under exactly the same circumstances may be guilty of second degree murder.

I am aware of the strong political, social, economic, religious, and philosophical views on capital punishment held by the public. These are proper matters for the Legislature to consider in the enactment of criminal statutes. When laws are constitutional, the courts should interpret them and should not legislate. My personal views on capital punishment must be subordinate to my sworn duty to follow and interpret the written law. As a Justice of this Court, I have, in the past, carefully followed prior Federal Constitutional guidelines by affirming approximately thirty death sentences, and upholding Florida's old capital punishment statute. I now must determine that Florida's current capital punishment statute is inadequate to meet the requirements of the Supreme Court of the United States, and I, therefore, must dissent.

Eddie T. JACKSON, Petitioner,

v.

NAT HARRISON ASSOCIATES and the Florida Industrial Relations Commission, an Administrative Agency, Respondents.

No. 43101.

Supreme Court of Florida.

June 6, 1973.

Certiorari to review an order of the Industrial Relations Commission reversing a compensation order of the Judge of Industrial Claims in favor of petitioner. The Supreme Court, Carlton, C. J., held that to determine whether an employee has suffered a successive compensable injury, Judge of Industrial Claims must first find that employee has received compensation for a previous permanent partial disability, impairment or disease, that employee incurred another compensable permanent partial disability from injury or disease, and that second disability merged with preexisting one to cause a greater permanent partial disability than would have resulted from second injury or disease alone, and to determine amount of compensation to allow for a subsequent injury, judge must make a finding as to entire resulting disability and compensation payable therefor, determined on basis of employee's earning capacity at time of second injury, and, after deducting actual compensation received for preexisting disability, whether by settlement or otherwise, award the difference of any.

Returned to Commission with instructions to remand to judge for necessary findings.

1. Workmen's Compensation ⇐1755

To determine whether an employee has suffered successive compensable injuries which have cumulative effects, Judge of Industrial Claims must find that employee has received compensation for a previous permanent partial disability, impairment or disease, that employee incurred another compensable permanent partial disability from injury or disease, and that second disability merged with preexisting one to cause a greater permanent partial disability than would have resulted from second injury or disease alone. F.S.A. § 440.15(5)(c).

2. Workmen's Compensation ⇐845, 1755

To determine amount of compensation to allow for a subsequent injury, Judge of Industrial Claims must make a finding as to entire resulting disability and compensation payable therefor, determined on basis of employee's earning capacity at time of

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SAWYER, Anthony Eugene, Appellant,

v.

STATE of Florida, Appellee.

No. 44709.

Supreme Court of Florida.

Feb. 19, 1975.

The Dade County Circuit Court, Paul Baker, J., found defendant guilty of felony-murder in the first degree, sentenced him to death, and he appealed. The Supreme Court, Overton, J., held that imposition of the death penalty on defendant was justified by the aggravating circumstances disclosed of record, including (1) the facts of the armed robbery incident, (2) defendant's prior record, including the commission of multiple robberies, (3) the fact that he was a hard drug user, requiring the expenditure of $200 per day, and (4) the specific finding of threats of reprisals by defendant, a man with an uncontrollably violent temper, against those persons involved in the trial and prosecution of him.

Judgment and sentence affirmed.

Ervin (Retired), J., dissented in part and concurred in part with an opinion in which Boyd, J., concurred.

Dekle, J., dissented.

Homicide ⇐354

Imposition of death penalty on defendant, who was convicted of felony-murder in the first degree, was justified by the aggravating circumstances disclosed of record, including (1) the facts of the armed robbery incident, (2) defendant's prior record, including the commission of multiple robberies, (3) the fact that he was a hard drug user, requiring the expenditure of $200 per day, and (4) the specific finding of threats of reprisals by defendant, a man with an uncontrollably violent temper, against those persons involved in the trial and prosecution of him. West's F.S.A. §§ 782.04, 921.141(2).

Robert S. Guralnick of Guralnick & Gellman, Miami, for appellant.

Robert L. Shevin, Atty. Gen., and Raymond L. Marky, Asst. Atty. Gen., for appellee.

OVERTON, Justice.

This cause is before us on a direct appeal by the appellant from a conviction of a felony murder in the first degree and a sentence of death imposed on him by the Circuit Court for Dade County, Florida. We have jurisdiction pursuant to Article V, Section 3(b)(1), Florida Constitution.

The facts are as follows: On January 12, 1973, the appellant and two other individuals entered a liquor store in Dade County, Florida, for the purpose of perpetrating a robbery. The appellant, with a revolver in his hand, directed the proprietor's son to turn over all of the money. The son turned over the money in the cash register, and then the appellant pushed the son into the back room, questioning him with regard to "the rest of it." At this point, the son, his father, and appellant were in the back room together. The wife of the proprietor picked up a bottle of whiskey and, while standing behind the appellant, struck him over the head with it. Simultaneously, the owner grabbed the appellant around the chest in an attempt to subdue him. During the struggle, the gun which the appellant was holding discharged twice, striking the son and causing his death. The owner released appellant, reaching for his son, and the appellant fled the store. Other shots were fired, resulting in the proprietor's wife being slightly wounded.

The appellant was indicted for first degree murder, and after trial the jury returned a verdict of guilty of murder in the

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first degree as charged in the indictment. At the hearing on the advisory sentence, the only additional evidence presented to the jury was the appellant's prior record. The appellant put on no evidence in his own behalf other than the closing statement of his counsel. After hearing and deliberation, the jury returned an advisory sentence for life imprisonment by a majority vote. The trial court overruled the trial jury in its recommendation and imposed the sentence of death, setting forth its reasons and findings in a written order which is as follows:

"THIS CAUSE came before the Court for trial by jury and after deliberation a verdict was rendered finding the defendant guilty of Murder in the First Degree.

"Thereafter, the defendant was adjudicated guilty by the Court and the jury after hearing additional matters retired to consider an advisory sentence pursuant to Florida Statute 921.141(2). The jury returned and in open court recommended a sentence in the State Penitentiary for life.

"This Court is in possession of additional facts which the jury did not have during their deliberation on the advisory sentence. Those facts are as follows:

"1. The defendant is charged in the United States District Court for the Southern District of Florida with the crime of bank robbery.

"2. This Court takes judicial notice of its own calendar and notes that there are thirteen (13) additional robbery cases against the same defendant, and that except for four (4) all have been heard before a magistrate and the magistrate has found that the proof was evident and the presumption great that the defendant, ANTHONY E. SAWYER, committed the offenses with which he stands charged. In the remaining four (4) robbery cases the defendant, ANTHONY E. SAWYER, waived his right for a preliminary hearing.

"3. During the course of the trial the defendant communicated to various bailiffs that he would take reprisals against persons conducting the trial in the event he would be found guilty.

"4. On October 15, 1973, the date the defendant was to appear before the jury for the rendition of an advisory sentence, he refused to leave his cell in the Dade County Jail, physically assaulted one of the Corrections and Rehabilitation officers and had to be forcibly brought before the Court in handcuffs and leg irons. Counsel for the defendant objected to his being viewed by the jury with handcuffs and leg irons and additional guards were ordered in the courtroom and the handcuffs and leg irons were removed prior to a view by the jury.

"5. The Court finds the defendant is possessed of a violent and ungovernable temper, that he has demonstrated violence in the past and that he has the ability to carry out threats of violence expressed during the course of the trial.

"6. The defendant according to the testimony adduced during the trial was supporting a drug habit of $200.00 a day or $72,000.00 a year. The Court is of the opinion that there is insufficient assistance available to curb this drug habit and the defendant could not be rehabilitated to a point where he would no longer be a danger to the community.

"For the reasons hereinabove stated, this Court, having considered the advisory opinion of the jury as well as the additional circumstances not known to the jury, has made the determination that the defendant be sentenced to death by electrocution."

Items 1 through 4 in the aforementioned order contain factual matters that were not presented to the jury. The appellant takes no issue with the facts as set forth therein. We have granted a motion by the State to complete the record and include the appellant's plea of guilty to ten separate charges of robbery. This substantially corroborates the finding by the trial judge in Item 2 of the aforementioned order.

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We find that the aggravating circumstances including (1) the facts of the armed robbery incident; (2) the prior record, including the commission of multiple robberies; (3) the fact that the appellant was a hard drug user, requiring the expenditure of $200.00 per day; and (4) the specific finding of threats of reprisals against persons involved in the trial and prosecution of the appellant and the appellant's violent temper, taken together, are more than adequate to justify the imposition of the death penalty in this cause.

The contentions raised by the appellant alleging the vagueness of the felony murder provisions of Section 782.04, Florida Statutes, are without merit and have been answered by this Court in State v. Dixon, 283 So.2d 1 (Fla.1973). See also State v. Carroll, 287 So.2d 304 (Fla.1973).

The contention that the imposition of the death penalty is unconstitutional has also been previously answered by this Court, and we adhere to those rulings. State v. Dixon, supra; State v. Carroll, supra.

Accordingly, no reversible error appearing, the judgment and sentence of the circuit court appealed from are hereby affirmed.

It is so ordered.

ADKINS, C. J., and ROBERTS and McCAIN, JJ., concur.

ERVIN (Retired), J., dissents in part and concurs in part with opinion, with which BOYD, J., concurs.

DEKLE, J., dissents.

ERVIN, (Retired), Justice (concurring in part and dissenting in part):

I concur in the opinion of the majority to the extent that it affirms appellant's conviction of first degree murder and dissent to the extent that it affirms his sentence of death. I would commute appellant's sentence to life imprisonment on two grounds.

First, I cannot agree with the prior and present judgment of this Court as to the constitutionality of the Florida death penalty statutes, Sections 921.141, 782.04 and 775.082, F.S., in the light of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). See my dissenting opinions in State v. Dixon, 283 So.2d 1 (Fla. 1973); Spinkellink v. State, 313 So.2d 666, now pending, and Gardner v. State, 313 So.2d 675, now pending.

Second, it appears to me that the trial judge, in overruling the jury's recommendation of life imprisonment and in sentencing appellant to death, took into consideration and relied upon aggravating circumstances not expressly provided by Section 921.141(6), including robbery charges pending against appellant of which he has not yet been convicted, appellant's demeanor and conduct at the trial for which he has not yet been charged or convicted, and appellant's allegedly incurable drug addiction.

Although Section 921.141(1) permits at the sentencing hearing the introduction of any evidence as to any matter that the trial judge deems relevant to sentencing regardless of its admissibility under the exclusionary rules of evidence, as I read the statute, Section 921.141(3) limits the trial judge as to the sentence to be imposed to the aggravating circumstances expressly enumerated in Section 921.141(6) and the mitigating circumstances expressly enumerated in Section 921.141(7). Furthermore, this Court said in *Dixon*:

"The most important safeguard presented in Fla.Stat. § 921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which *must be determinative of the sentence imposed.*" (Emphasis supplied). 283 So.2d at 8.

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Here the trial judge did not adhere in sentencing to the express guidelines of the statute and, as a result, reintroduced the element of discretion rejected in *Furman*.

For these reasons, I would reduce appellant's sentence to life imprisonment in accord with the recommendation of a majority of the jury.

BOYD, J., concurs.

NORTH PORT BANK, etc., Appellant,

v.

STATE of Florida, DEPARTMENT OF REVENUE, et al., Appellees.

No. 45613.

Supreme Court of Florida.

April 16, 1975.

Rehearing Denied June 30, 1975.

Taxpayer appealed a decision of the Circuit Court, Leon County, Donald O. Hartwell, J., upholding the constitutionality of statute setting forth requirements prior to institution of suit challenging assessment of intangible personal property taxes. The Supreme Court, Boyd, J., held that statute providing that a taxpayer shall, except where taxes have been paid, tender into court and file with complaint full amount of complained of assessment including penalties or file with complaint bond to satisfy any judgment or decree in full, including taxes complained of and penalties if construed not to require taxpayer to post bond in amount of contested assessment but only to require taxpayer to post bond upon satisfaction of court's judgment as to proper tax, is constitutional.

Affirmed.

1. Courts ⇐216

Supreme Court had jurisdiction over appeal from judgment passing upon constitutionality of statute requiring taxpayer to tender into court and to file with its complaint full amount of complained of assessment of intangible personal property taxes, including penalties, or, alternatively, to file cash or surety bond with complaint. West's F.S.A. § 199.242(3); West's F.S.A.Const. art. 5, § 3(b)(3).

2. Taxation ⇐572

Transitory nature of intangible personal property taxes justifies the State in adopting collection methods that differ from those used to collect real property ad valorem taxes.

3. Constitutional Law ⇐328

Taxation ⇐37.6

Statute providing that a taxpayer shall, except where taxes have been paid, tender into court and file with complaint full amount of complained of assessment of intangible personal property taxes including penalties or file with complaint bond to satisfy judgment in full, including taxes complained of and penalties, if construed not to require the posting of a bond in amount of contested assessment but to require the posting of bond upon satisfaction of court's judgment as to proper tax, does not deny taxpayer constitutional right of access to courts. West's F.S.A. § 199.242(3); West's F.S.A.Const. art. 1, § 21.

4. Constitutional Law ⇐48(1)

It is established maxim of statutory construction that courts have judicial obligation to sustain legislative enactments when possible.

5. Taxation ⇐451

Whenever taxpayer believes intangible personal property taxes assessed are too high, administrative remedies should first be exhausted.

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Learie Leo ALFORD, Appellant,

v.

STATE of Florida, Appellee.

No. 44647.

Supreme Court of Florida.

Jan. 29, 1975.

Rehearing Denied Feb. 10, 1975.

Defendant was convicted in the Circuit Court, Palm Beach County, Marvin U. Mounts, Jr., J., of rape and murder. Defendant appealed. The Supreme Court, Adkins, C. J., held that the murder statute was constitutional and that certain rulings on admission of evidence had not been erroneous. Where the trial judge found that the premeditated murder was committed while defendant was engaged in the commission of or in flight after committing rape and that the act was especially heinous, atrocious and cruel and that the only mitigating circumstance was that defendant had no significant prior criminal record, and where evidence of guilt was particularly strong, and in view of the Supreme Court's comparison of the aggravating and mitigating circumstances with those shown in other capital cases, death was the proper sentence.

Affirmed.

Ervin, Retired, J., dissented.

1. Criminal Law ⇐1206(1)

Capital punishment is not per se violative of Constitution of United States or of State. West's F.S.A. §§ 782.04, 921.141; U.S.C.A.Const. Amends. 8, 14.

2. Criminal Law ⇐1206(1)

Procedure outlined in capital punishment statute is such that discretion is controlled and channeled until sentencing process becomes matter of reasonable judgment rather than exercise in discretion, and penalty provisions of statute are not unconstitutional. West's F.S.A. § 921.141; U.S.C.A.Const. Amends. 8, 14.

3. Courts ⇐91(1)

Authoritative construction of state statute by highest court of State is binding as to what statute does or does not mean. West's F.S.A. §§ 782.04, 921.141.

4. Homicide ⇐8

Statutes were not unconstitutional as failing to adequately distinguish between felony-murder in first degree and felony-murder in second degree. West's F.S.A. §§ 782.04, 921.141.

5. Criminal Law ⇐371(4, 9, 12)

In prosecution for rape and murder, testimony concerning defendant's unsuccessful attempt to commit homosexual act shortly before commission of act charged was admissible to establish state of mind and motive. West's F.S.A. §§ 782.04, 921.141.

6. Searches and Seizures ⇐7(1)

Seizure of so-called "mere evidence" of crime is not proscribed by Fourth Amendment. U.S.C.A.Const. Amend. 4.

7. Searches and Seizures ⇐3.8(2)

Where officers had search warrant and consent from defendant to search his apartment, officers were warranted in seizing items found in plain view or discovered inadvertently during course of reasonable search of premises, in absence of indication that they were conducting general exploratory search or that search for spent cartridges was subterfuge or excuse to conduct general exploratory search. U.S.C.A.Const. Amend. 4; West's F.S.A. §§ 933.18, 933.18(6).

8. Searches and Seizures ⇐3.6(2)

Shell casings constituted "instrumentality or means" of shooting within statute

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concerning scope of search warrant. West's F.S.A. §§ 933.18, 933.18(6); U.S. C.A.Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

9. Criminal Law ⇐539(1)

Where all procedural and evidentiary requirements prerequisite to introduction of "former testimony" were met, there was no error in allowing testimony given at preliminary hearing to be read to jury at trial.

10. Criminal Law ⇐438(1)

When photograph is relevant it is admissible, unless what it depicts is so shocking in nature as to overcome value of its relevancy.

11. Criminal Law ⇐438(5, 7)

In prosecution for rape and murder, where defense counsel stated that he did not know whether victim was raped or whether "necessary force and violence" had been used, photographs showing that deceased had been blindfolded and had sustained numberous bullet wounds were relevant to prove "force and violence," and where photographs were not so gruesome or inflammatory as to create undue prejudice in minds of jury, they were admissible.

12. Criminal Law ⇐1206(3)

"Aggravating circumstances" of capital punishment statute actually define those crimes to which death penalty is applicable in absence of mitigating circumstances. West's F.S.A. § 921.141.

See publication Words and Phrases for other judicial constructions and definitions.

13. Criminal Law ⇐571

"Aggravating circumstances" of capital punishment statute must be proved beyond reasonable doubt before being considered by judge or jury. West's F.S.A. § 921.141.

14. Criminal Law ⇐1206(3)

Term "heinous" as used in statute defining aggravating circumstances authorizing death penalty means extremely wicked or shockingly evil. West's F.S.A. § 921.141.

See publication Words and Phrases for other judicial constructions and definitions.

15. Criminal Law ⇐1206(3)

Term "atrocious" as used in statute setting forth aggravating circumstances authorizing death penalty means outrageously wicked and vile. West's F.S.A. § 921.141.

See publication Words and Phrases for other judicial constructions and definitions.

16. Criminal Law ⇐1206(3)

Term "cruel" as used in statute relating to aggravating circumstances authorizing death penalty means designed to inflict high degree of pain with utter indifference to, or even enjoyment of, suffering of others. West's F.S.A. § 921.141.

See publication Words and Phrases for other judicial constructions and definitions.

17. Criminal Law ⇐1208(3)

When one or more of statutory "aggravating circumstances" is found, death is presumed to be proper sentence under capital punishment statute unless such circumstance or circumstances are overridden by one or more of mitigating circumstances provided by statute. West's F.S.A. § 921.141.

18. Criminal Law ⇐986

In capital case, all evidence of statutory "mitigating circumstances" may be considered by judge or jury. West's F.S.A. § 921.141.

19. Homicide ⇐354

Where trial judge found that premeditated murder of victim was committed while defendant was engaged in commission of or in flight after committing life felony of rape and that act was especially heinous, atrocious and cruel and that only mitigating circumstance was that defendant had no significant prior criminal record and where evidence of guilt was particularly strong, and in view of Supreme Court's comparision of aggravating and mitigating circumstances with those shown in other capital cases, death was proper sentence. West's F.S.A. § 921.141.

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David Roth, of Cone, Wagner, Nugent, Johnson & McKeown, and Joel T. Daves III, of Burdick & Daves, West Palm Beach, for appellant.

Robert L. Shevin, Atty. Gen., and Raymond L. Marky, Asst. Atty. Gen., for appellee.

ADKINS, Chief Justice.

Again we consider the constitutionality of the Florida murder statute, Fla.Stat. § 782.04 and § 921.141, F.S.A., which we upheld in State v. Dixon, 283 So.2d 1 (Fla. 1973). Jurisdiction to hear this cause lies in Fla.Const., art. V, § 3(b)(1), F.S.A.

Appellant, Learie Leo Alford (hereinafter referred to as defendant), a 27-year-old male, was convicted of the rape and murder of a 13-year-old female.

On Sunday, January 7, 1973, the deceased left her home to meet her girl friend at a neighborhood bus stop so the two could go to the beach together. Later that day, her body was discovered lying atop a trash pile in an area west of Riviera Beach. She had been raped and shot to death, execution style; her nude body was found blindfolded, with bullet wounds in her head, chest, back and arm.

Several witnesses described a man wearing a white hat and fitting Alford's description and a car similar to the one driven by him present at or near the scene of the crime at about 10:30 a. m., the approximate time of death.

Ballistic experts stated that at least one of the projectiles found in the victim's body came from the pistol of defendant's supervisor, Willie White. White, a security guard, testified that on the morning of January 7th, he had given the pistol to Alford when the latter relieved him of duty at the freight yard where he worked.

Pursuant to a search warrant which authorized a search of defendant's dwelling for spent .38 caliber cartridge casings, various items of clothing, including a floppy white hat, were seized. The clothing indicated the presence of blood factors A and O. Also, cotton swabs taken from the vaginal and anal area of victim's body indicated the presence of blood factors A and O. The victim's blood type was A; defendant's blood type is O.

The only defense raised by appellant at the trial was alibi. He denied involvement in the crime.

After finding the defendant guilty of murder in the first degree, the jury in a separate sentencing proceeding pursuant to Fla.Stat. § 921.141, F.S.A., recommended the death penalty. The trial judge then made his written findings of fact required by Fla.Stat. § 921.141(3)(b), F.S.A. Although the defendant had no significant history of prior criminal activity, the trial judge gave as a reason for imposing the death sentence the following aggravating circumstances: The capital felony of murder in the first degree was committed while the defendant was engaged in the commission of, or in flight after committing a life felony, which was rape, and of which he was convicted in the same trial; this capital felony was especially heinous, atrocious and cruel.

[1, 2] This appeal is from the judgment of guilt and sentence to death.

Defendant first contends that Fla.Stat. § 782.04, F.S.A., taken in conjunction with

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the penalty provisions found in Fla.Stat. § 921.141, F.S.A., is unconstitutional and violates the dictates of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Defendant recognizes that this Court upheld the statute in State v. Dixon, *supra*, but says that we should recede from this decision because *discretionary* death penalties are unconstitutional or, in the alternative, the imposition of the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

We reaffirm the decision in State v. Dixon, *supra*, holding that the mere presence of discretion in the sentencing procedure does not violate Furman v. Georgia, *supra*. This Court, in State v. Dixon, said:

> "Discretion and judgment are essential to the judicial process, and are present at all stages of its progression—arrest, arraignment, trial, verdict, and onward through final appeal. Even after the final appeal is laid to rest, complete discretion remains in the executive branch of government to honor or reject a plea for clemency. See Fla.Const., art. IV, § 8, F.S.A., and U.S.Const., art. II, § 2.
>
> "Thus, if the judical discretion possible and necessary under Fla.Stat. § 921.141, F.S.A., can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of Furman v. Georgia, *supra*, has been met. What new test the Supreme Court of the United States might develop at a later date, it is not for this Court to suggest." 283 So.2d 1, pp. 6 and 7.

The procedure outlined in Fla.Stat. § 921.141, F.S.A., is such that the discretion is controlled and channeled until the sentencing process becomes a matter of reasonable judgment rather than an exercise in discretion at all.

Furthermore, capital punishment is not, per se, violative of the constitution of the United States or of Florida. See Wilson v. State, 225 So.2d 321 (Fla.1969).

[3, 4] Defendant next contends that the Legislature failed to adequately distinguish between felony murder in the first degree and felony murder in the second degree, in that these provisions are so ambiguous that the same act may constitute either first degree or second degree murder, depending upon the whim of the prosecutor. This question was also laid to rest in State v. Dixon, *supra*, which we reaffirm on this point also. For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation, the United States Supreme Court will take the statute as though it read precisely as the highest Court of the State has interpreted it. An authoritative construction of a state statute by the Supreme Court of Florida is binding as to what the statute does or does not mean. See Wainwright v. Stone and Huffman, 414 U.S. 21, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973); Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

The first and second contentions of defendant, attacking the constitutionality of the capital punishment statute as well as the procedure thereunder, are without merit.

[5] Defendant next contends the trial judge committed prejudicial error by admitting evidence that the defendant and another man attempted to engage in an homosexual act immediately prior to the commission of the offense charged.

It is settled law in this State that evidence of any facts relevant to a material fact in issue, except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion. Williams v. State, 110 So.2d 654 (Fla.1959).

The trial judge in the case *sub judice* admitted testimony that defendant and another man attempted to engage in anal intercourse in the hour preceding the rape and murder of the victim. Defendant says such evidence was irrelevant and constituted an improper assault on the character of the defendant, prejudicing him in the minds of the jury.

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The State says that defendant's unfulfilled desire to have sexual relations with another man led to the abduction of the victim and the sexual assault upon her. The other man testified that he and the defendant were unsuccessful in engaging in anal intercourse due to the presence of other people in the area. Thus the State maintains that sexual frustration resulting from the inability to complete the homosexual act occurring around 9:30 a. m., was the motive for the sexual assault on the victim occurring between 10:00 a. m. and 11:00 a. m. the same day. Accordingly, the State maintains the testimony was relevant and admissible.

In State v. Statewright, 300 So.2d 674, (Fla.1974), the State attempted to show that the motive for the murder was the accused's fear that the deceased would publicly reveal the accused's alleged homosexuality, the accused supposingly having made improper advances to the deceased. We held that testimony relating to a homosexual act allegedly committed by the accused some five years prior to the crime for which he was tried was relevant to the issue of motive.

Commonwealth v. Winter, 289 Pa. 284, 137 A. 261 (1927), is a well-reasoned decision with facts similar to those in the instant case. The facts disclosed a sadistic murder of two children, a brother and sister, one seven years old and the other nine. Evidence was admitted that within an hour of the time when he met them, the accused tried unsuccessfully to solicit the victims' older brothers to commit sodomy. The Court stated:

> "The courts are bound to recognize, particularly in crimes relating to matters of sex . . . that the mental state of the accused is an important factor; anything which throws light upon his state of mind just previous to the commission of the offense with which he is charged strongly illuminates his place in the picture of the crime and gives better opportunity to estimate the likelihood of his connection with it. . . .
>
> "Our conclusion is that the evidence of defendant's solicitation of the two other children to commit an unnatural crime was properly received as showing his state of mind on the day in question shortly before the commission of the crime with which he was charged, and the motive which governed him in seeking to have the two deceased children accompany him, and in their subsequent murders." 137 A. 261, pp. 263, 264.

In Lawson v. State, 171 Ind. 431, 84 N.E. 974 (1908), the defendant was charged with and convicted of the murder of her husband, which she claimed was done in self-defense. In permitting the introduction of evidence of her improper relations with another man, the court said:

> "The state clearly was entitled to place before the jury as evidence any circumstances which might suggest a possible motive on the part of the accused for perpetrating the unnatural crime of killing her husband. The jury possibly might believe from the evidence that Russell had so alienated her affections that she desired the death of her husband, and therefore was induced to kill him for that reason. Whether the evidence was sufficient to justify this belief was a matter for the determination of the jury. That it was, however, competent for the purpose for which it was introduced, is well settled." 84 N.E. 974, p. 976.

In Kallas v. State, 227 Ind. 103, 83 N.E. 2d 769 (1949), the State argued that the accused killed the victim because of his resistance to the unnatural advances of the accused. The court held that the accused's prior act of homosexuality and unnatural

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lust was a manifestation of an abnormal mental condition and therefore relevant to establish the motive and intention with which he killed his victim.

Based on the foregoing, we hold that the circumstances surrounding the earlier unfulfilled sexual act were relevant to establish the state of mind of appellant and the motive for the assault on the victim occurring only a short time thereafter. Such evidence also was relevant to rebut alibi testimony. The trial court did not err in admitting such testimony.

The trial court allowed into evidence items of clothing taken from defendant's home under color of a search warrant which authorized a search for shell casings.

The defendant was arrested on Tuesday, January 9, 1973, at 1:55 a. m., two days after the crime was committed. The officers obtained and executed the search warrant later the same day. Defendant had signed two consent forms authorizing the search of his car and his apartment.

During the course of the search of the apartment, the officers discovered in plain view certain items of clothing subsequently introduced into evidence at the trial. These items were part of the circumstantial evidence leading to the conviction of appellant.

At the time of the search the defendant was in custody at the Palm Beach County Jail.

Testimony showed that the police were aware of the possible existence of these items of evidence approximately three hours after the body of the victim was discovered at about 3:00 o'clock Sunday afternoon. The search was conducted at approximately 7:00 o'clock Tuesday evening. The items of clothing were discovered inadvertently, in plain view during the course of a thorough search for the cartridges, none of which were found.

Defendant's primary contention is that the seizure of the items of clothing went beyond the scope of the search warrant. Relying on the Fourth Amendment to the United States Constitution, Fla.Const., art. I, § 12, F.S.A., and Fla.Stat. § 933.07, F.S.A., defendant argues that each of these requires that warrants particularly describe the items to be seized; also, that Fla.Stat. § 933.14, F.S.A., provides for the return of property taken when it is not the same as that described in the warrant. Thus, asserts defendant, the seizure of the items of clothing, which were not fruits or instrumentalities of the crime, was error since they were not particularly described in the search warrant.

[6] The seizure of the so-called "mere evidence" of a crime is not proscribed by the Fourth Amendment. Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). In *Hayden*, the defendant was closely pursued by police officers to his home. While searching for Hayden, the police discovered in a washing machine a jacket and trousers of the type the defendant was said to have worn, and a cap was found under a mattress. This evidence was allowed over defendant's objection that it was "mere evidence" and not the fruit or instrumentality of the crime. The United States Supreme Court held that there no longer is any valid reason to distinguish seizures of "mere evidence" from seizures of "fruits, instrumentalities, or contraband". Further:

> "But if its [mere evidence rule] rejection does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of 'a neutral and detached magistrate. . . .'" 387 U.S. 294, pp. 309, 310, 87 S.Ct. 1642, p. 1651.

Defendant also questions why the police did not include in the search warrant an

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authorization to seize the items of clothing when the testimony indicates knowledge of their existence some 48 hours prior to the execution of the search warrant.

[7] The search was conducted with the consent of the defendant and under authority of an admittedly valid warrant. A reasonable search for small items such as .38 caliber cartridges logically would lead to closets, drawers, clothes piles, and any other conceivable nook and cranny in which they could be found. Having authority and justification for being where they were, the officers were clearly warranted in seizing items found in plain view or discovered inadvertently during the course of a reasonable search of defendant's premises. There is nothing to indicate that the officers were conducting a general exploratory search or that the search for spent cartridges was a subterfuge or an excuse to conduct such a general exploratory search.

[8] Fla.Stat. § 933.18, F.S.A., restricts the issuance of a search warrant for the search of a private dwelling to certain enumerated categories of property. Defendant contends that the statute does not authorize the issuance of a warrant to search for the items of evidence that were actually seized from the defendant's dwelling, and therefore the trial court erred in denying the defendant's motion to suppress. However, the statute provides that a warrant may be issued to search a dwelling if a weapon, instrumentality, or means by which a felony has been committed is contained therein. The search warrant issued in this case authorized the seizure of "spent .38 caliber cartridge casings." We hold that the shell casings constitute an "instrumentality or means" within the meaning of Fla.Stat. § 933.18(6), F.S.A.; therefore, the warrant was not issued in violation thereof. The fact that clothing, not shell casings, was located, does not invalidate the search warrant or the search itself.

The State, in this case, should not be held to the strict requirement that only those things particularly described in the warrant may be seized. This would fly in the face of the universally accepted "plain view" exception to the warrant requirement of the Fourth Amendment. The police are not required to close their eyes and turn their heads away from evidence inadvertently discovered during the course of a lawful search, the presence of which they had no prior knowledge. See Coolidge v. New Hampshire, 403 U.S. 443, 465, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Bretti v. Wainwright, 439 F.2d 1042 (5th Cir. 1971).

[9] We next consider the admissibility at trial of the testimony of a witness taken at the preliminary hearing.

Johnny Jones was a material witness in the State's case against Leo Alford. He lived directly across the street from the site of the crime. On January 7, 1973, the morning of the crime, Jones heard several shots being fired and observed a yellow Dodge or Plymouth back out of the area "fast." At the preliminary hearing he gave testimony regarding the identity of a certain white hat he saw being worn by the person driving the yellow car and also regarding some photographs of the same car. This testimony was read to the jury at the trial, over the objection of the defendant.

It appears that on March 19, 1973, the witness Jones was subpoenaed to appear at the trial, which was scheduled for April 16, 1973. On April 5, 1973, Jones notified the prosecuting attorney that he was leaving town within a few days to enter a hospital in Wisconsin. On April 11, 1973, the State's motion to perpetuate Jones' testimony was granted, but no attempt was ever made to do so.

Jones left the State after advising the prosecuting attorney and refused when requested to return. It appears that there was no medical reason why the witness could not return for trial.

On the third day of the trial, the State first advised the trial judge and defendant that Jones was not available and offered to

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read the testimony given by Jones at the preliminary hearing. No attempt was made to take Jones' deposition.

The trial judge found that although there was some confusion concerning the motion to perpetuate testimony, the State tried in good faith to produce the witness and that his absence was not procured through contrivance of the State. The judge also found that counsel for defendant appeared at the preliminary hearing and was allowed full cross-examination of Jones and concluded that it would better serve the interests of justice to allow the reading to the jury of the testimony of the preliminary hearing taken before a magistrate rather than the reading of a deposition not taken before a magistrate. Further, the testimony was previewed outside the presence of the jury before being read to the jury. Finally, similar supportive testimony to that of witness Jones was given by two other competent witnesses at the trial.

Defendant takes the position that the opportunity for adequate cross-examination was not provided at the preliminary hearing because certain important witnesses and facts were not available to the defense for proper preparation for said cross-examination. Counsel also cites certain discrepancies in the testimony of Jones when compared to other witnesses whose testimony was not available or known at the preliminary hearing, resulting in prejudice to the defendant when the testimony of Jones was read to the jury and affecting his substantive rights.

Recently this Court held that a bystander could testify at trial as to his recollections of a witness' testimony at a preliminary hearing when the witness was unavailable at trial, even where no court reporter was present and no official record was made of the witness' testimony. Richardson v. State, 247 So.2d 296 (Fla.1971). We said that a preliminary hearing is not distinguishable from a previous trial in the application of the "former testimony" exception to the hearsay rule. In *Richardson*, as in the case *sub judice*, there existed the additional safeguard of supportive testimony given in person at the trial by two other witnesses.

All procedural and evidentiary requirements prerequisite to the introduction of the "former testimony" appear to have been met. See James v. State, 254 So.2d 838 (Fla.App. 1st, 1971); Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970). The testimony was admissible.

Defendant also complains because pictures of the deceased victim were admitted into evidence.

[10] When a photograph is relevant it is admissible, unless what it depicts is so shocking in nature as to overcome the value of its relevancy. Williams v. State, 228 So.2d 377 (Fla.1969). Therefore, relevancy is the initial determination. The defendant contends that the photographs were not relevant since no contention was made that a horrible crime had not been committed. The defense was that the defendant did not commit the crime.

[11] In his opening statement to the jury the defendant's counsel stated that he did not know whether the victim was raped, nor whether "the necessary force and violence" was used. One of the four photographs showed that the deceased had been blindfolded and had sustained numerous bullet wounds. Thus, they were relevant to prove "force and violence."

Once it has been established that the photographs are relevant, it must then be determined whether the gruesomeness of the portrayals is so inflammatory as to create an undue prejudice in the minds of the jury, and thereby overcomes the value of their relevancy. We take note that the trial judge allowed in evidence only four photographs depicting the body of the victim and none of those were duplications. Additionally, the trial judge ruled inadmissible a close-up photograph of the victim's

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vaginal area revealing injury to that area. This court in Williams v. State, *supra*, stated that "the view depicted is neither gory nor inflammatory beyond the simple fact that no photograph of a dead body is pleasant." That same rationale applies with full force herein. The pictures were admissible.

After the defendant was adjudicated guilty of the capital felony of first degree murder, a separate sentencing proceeding was conducted pursuant to Fla.Stat. § 921.-141, F.S.A., which provides:

"(1) *Separate Proceedings On Issue Of Penalty.*—Upon conviction or adjudication of guilt of a defendant of a capital felony the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

"(2) *Advisory Sentence By The Jury.*—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

"(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

"(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist, and

"(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

"(3) *Findings In Support Of Sentence Of Death.*—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

"(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

"(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

"In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

"(4) *Review of Judgment and Sentence.*—The judgment of conviction and

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sentence of death shall be subject to automatic review by the Supreme Court of Florida within (60) days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

"(5) *Aggravating Circumstances.*—Aggravating circumstances shall be limited to the following:

"(a) The capital felony was committed by a person under sentence of imprisonment.

"(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

"(c) The defendant knowingly created a great risk of death to many persons.

"(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

"(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

"(f) The capital felony was committed for pecuniary gain.

"(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

"(h) The capital felony was especially heinous, atrocious or cruel.

"(6) *Mitigating Circumstances.*—Mitigating circumstances shall be the following:

"(a) The defendant has no significant history of prior criminal activity.

"(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(c) The victim was a participant in the defendant's conduct or consented to the act.

"(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

"(e) The defendant acted under extreme duress or under the substantial domination of another person.

"(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

"(g) The age of the defendant at the time of the crime."

Several witnesses were called by the defendant who testified as to his good character. The jury recommended the death penalty.

The trial judge then made his written findings of fact required by the following provisions of Fla.Stat. § 921.141(3)(b):

"(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

"In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082."

With respect to the above-mentioned provisions he found that aggravating circumstances (d) and (h) had been established beyond a reasonable doubt, as had mitigating circumstances (a), saying:

". . . Upon my review of both trials, of my trial notes and of the presentence investigation, I find as follows with respect to aggravating circumstances and mitigating circumstances:

"AGGRAVATING CIRCUMSTANCES.—

"(a) The defendant in this case was not under sentence of imprisonment for any other crime.

"(b) The defendant has never been convicted of another capital felony or of a felony involving the use or threat of violence to another person.

"(c) The defendant did not knowingly create a great risk of death to many persons.

"(d) This capital felony of murder in the first degree was committed while this defendant was engaged in the commission of or in flight after committing a life felony which was rape and of which he was also convicted in the same trial.

"(e) This capital felony was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

"(f) This capital felony was not committed for pecuniary gain.

"(g) This capital felony was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

"(h) This capital felony was especially heinous, atrocious and cruel.

"MITIGATING CIRCUMSTANCES.—

"(a) This defendant has no significant history of prior criminal activity.

"(b) This defendant was not under the influence of extreme mental or emotional disturbance when the capital felony was committed.

"(c) The victim of this capital felony was not a participant in the defendant's conduct nor did she consent to his acts.

"(d) This defendant was not an accomplice in the capital felony committed; he was the only participant.

"(e) This defendant did not act under extreme duress or under the substantial domination of another person in the commission of this capital felony.

"(f) The capacity of this defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired.

"(g) The age of this defendant at the time of the commission of the crime is not a factor, he having reached his majority some years prior to the commission of the crime. . . .

"With respect to my finding that this capital felony was especially heinous, atrocious or cruel, I observe that I have been engaged in the administration of criminal justice since 1959. During that period of time I have observed a number of brutal and conscienceless crimes. Compared against that experience, the criminal acts of this defendant are particularly shocking, heinous, atrocious and cruel. In this respect, I cite the scene of the crime, the victim as depicted by photographs introduced into evidence in this case and the testimony of the pathologist describing the wounds, damage and injury occasioned to that pathetic child's body. It is inexpressibly cruel."

The court concurred in the jury's sentence of death.

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[12-18] As we noted in State v. Dixon, *supra*, the most important safeguard provided by Fla.Stat. § 921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed. We thoroughly analyzed these circumstances in *Dixon*, *et* no further elaboration is necessary. We repeat, however, that:

"The aggravating circumstances of Fla.Stat. § 921.141(6), F.S.A., actually define those crimes—when read in conjunction with Fla.Stat. §§ 782.04(1) and 794.01(1), F.S.A.—to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury. . . .

"Fla.Stat. § 921.141(6)(d), F.S.A., provides that the commission of a capital felony as part of another dangerous and violent felony constitutes not only a capital felony under Fla.Stat. § 782.04(1), F.S.A., but also an aggravated capital felony. Such a determination is, in the opinion of this Court, reasonable. . . .

"The aggravating circumstance which has been most frequently attacked is the provision that commission of an especially heinous, atrocious or cruel capital felony constitutes an aggravated capital felony. Fla.Stat. § 921.141(6)(h), F.S.A. Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

"When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overriden by one or more of the mitigating circumstances provided in Fla.Stat. § 921.141(7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury. . . .

"It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia, *supra*, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all." 283 So.2d 1, pp. 7-10.

[19] The trial judge found that the [illegible] murder of the deceased victim was committed while defendant was engaged in the commission of or in flight after committing the life felony of rape of [illegible], and that the act was especially heinous, atrocious and cruel. The only mitigating circumstance was that the defendant had no significant prior criminal record. Additionally, the evidence of defendant's guilt in these crimes was particularly strong, discounting the possibility of an "innocent" man being sentenced to die.

In Taylor v. State, 294 So.2d 648 (Fla., 1974), we reversed the trial court's imposition of the death sentence where, unlike the case *sub judice*, the jury recommended a life sentence. However, in *Taylor* the mitigating circumstances clearly outweighed the aggravating circumstances. Not only did Taylor have no prior history of criminal activity, but in fact he had been shot five times during the exchange of gunfire in which the decedent was fatally wounded. It also appeared that the downward trajectory of the fatal bullet raised the possibility that Taylor had not fired the shot since he was on the floor with five bullets in his body. We concluded that these factors could have *substantially impaired* the rationality of Taylor to the point that the jury rejected the death penalty.

In Sullivan v. State, 303 So.2d 632 (Fla. 1974) opinion filed November 27, 1974, the defendant committed the crime of robbery, abducted the victim, struck him with a tire iron, and shot him with both barrels of a shotgun in the back of the head. The defendant reloaded and discharged both barrels again into the victim's head. He then stated, "I don't feel no different." The defendant, 25-years old at the time, had no previous criminal record. The sentence of death was held by this Court to be appropriate.

In Hallman v. State, 305 So.2d 180 (Fla. 1974), opinion filed December 11, 1974, the defendant committed the crime of robbery, cut the victim about the throat and neck with broken glass, slitting her throat and causing her death. The defendant had been convicted of two previous crimes involving an assault upon a young woman with a dangerous weapon. This Court held that the sentence of death was appropriate.

In the case *sub judice*, the victim was a 13-year-old female child. On Sunday, January 7, 1973, she was to meet a friend at a neighborhood bus stop so that the two could go to the beach together. She left her home and was last seen by a neighbor as she walked down the street. Her body was discovered lying on a trash pile. She had been raped, both vaginally and rectally, was blindfolded, and shot five or six times. The defendant was a 27-year-old male with no significant record of prior criminal activity. This was an aggravated and most indefensible crime. The condition of the body is definite proof of the commission of a conscienceless or pitiless crime which was unnecessarily tortuous to the victim. Comparing the aggravating and mitigating circumstances with those shown in other capital cases and weighing the evidence in the case *sub judice*, our judgment is that death is the proper sentence.

Pursuant to Rule 6.16(b), Florida Appellate Rules, we have reviewed the evidence to determine whether the interest of justice requires a new trial. No reversible error is made to appear and the evidence does not reveal that the ends of justice require that a new trial be awarded. We find that the judgment and sentence of the trial court in this cause is in accordance with the justice of the cause.

Accordingly, the judgment and sentence of the circuit court are hereby affirmed.

It is so ordered.

ROBERTS, McCAIN and OVERTON, JJ., concur.

ERVIN (Retired), J., dissents.

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